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Kentucky Department of Public Advocacy

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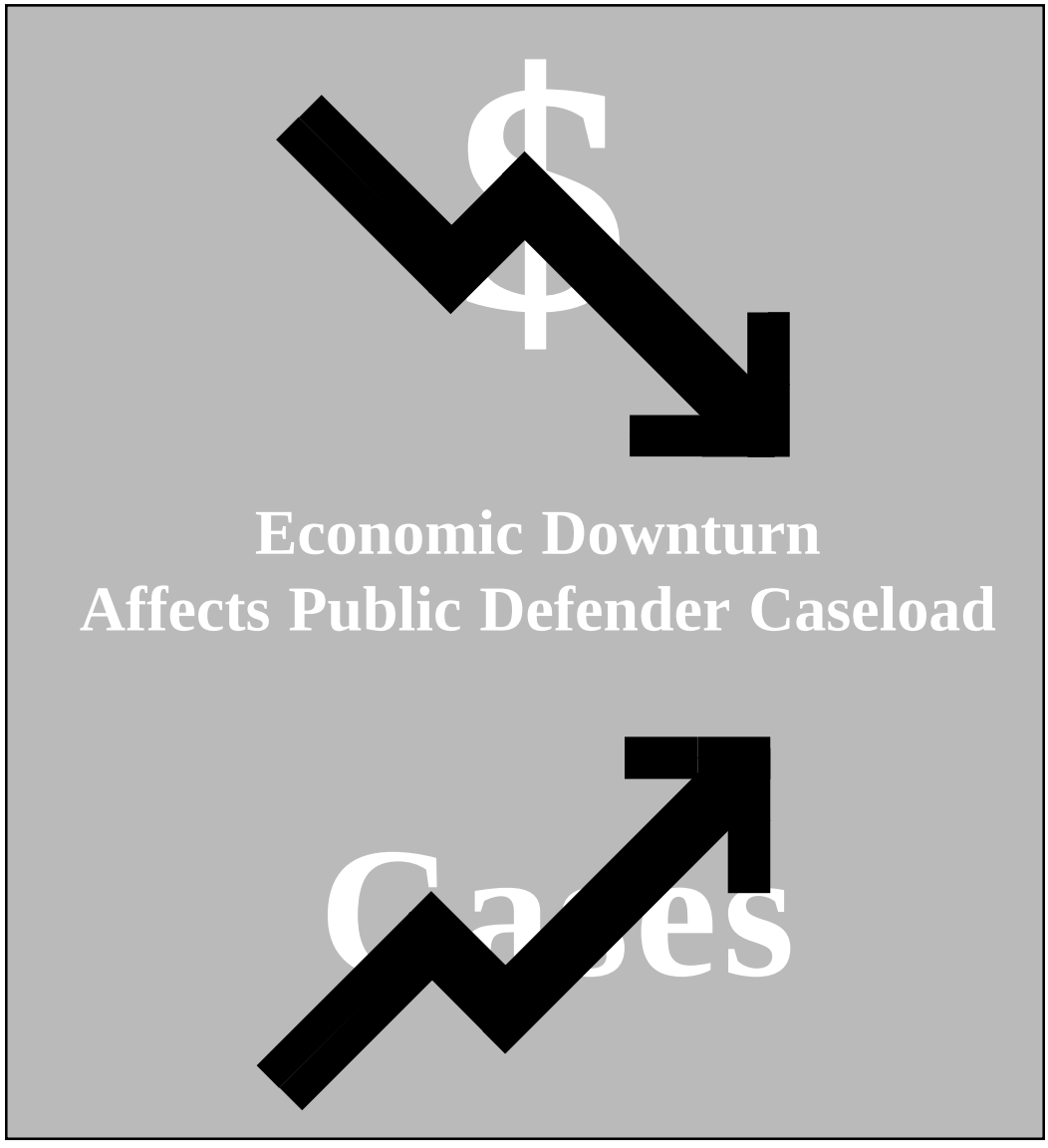

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The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM THE EDITOR...

Ed Monahan

The Economy and Budgets. We know as a matter of commonsense that when the economy goes south defender caseloads rise. Bryce Amburgey details the research that verifies the increased caseloads of defenders during recessions.

Kentucky Defender funding has greatly improved in the last 6 years. However, relative to others in Kentucky's criminal justice system, defenders are at the bottom of the totem pole. Kentucky Criminal Justice budgets after the recent reductions from the current fiscal year are set out.

Administration of Death Penalty Questioned. "A Broken System: Error Rates in Capital Cases 1973-1995," a major new decade long study on the death penalty is out. It is an indictment of the administration of capital punishment nationwide and in Kentucky. The error rate in capital cases is at an unacceptable level. Kentucky can rectify part of the problem by enacting legislation to eliminate the death penalty from 16 and 17 year olds. Eight out of ten Kentuckians support this reform.

Racial discrimination plays an inappropriate role in our criminal justice system. Kentucky is working to identify the discrimination. Defenders play a significant role in bringing about racial fairness.

Mental health evaluations play an increasingly important role in the criminal justice system. Too many are inadequate and misleading. John Blume and David Voisin help us understand how to bring about evaluations that have integrity.

2002 Annual Defender Conference. *The Client's Voice* is the theme for the 2002 Kentucky Department of Public Advocacy Conference. The focus will be on developing client relationships, pretrial release advocacy, creative negotiation and sentencing advocacy. *This year, the conference is one day rather than two and will not offer the full 12.5 CLE hours it has in the past.* It is the 30th Annual Public Defender Education Conference, and is June 11-12, 2002, Holiday Inn, Cincinnati Airport, 1717 Airport Exchange Blvd. For registration, contact: Patti Heying; Department of Public Advocacy; 100 Fair Oaks Lane, Suite 302; Frankfort, KY 40601; phone: (502) 564-8006 ext. 236; e-mail: pheying@mail.pa.state.ky.us

Juvenile Summits. This year the DPA's juvenile summits are open to all criminal defense practitioners and will offer **6 hours of CLE Credit**. The summits are as follows:

General Butler State Resort Park	March 18
Natural Bridge State Resort Park	March 22
Pennyrile State Resort Park	March 28
Lake Cumberland State Resort Park	April 25

For registration, contact: Patti Heying; Department of Public Advocacy; 100 Fair Oaks Lane, Suite 302; Frankfort, KY 40601; phone: (502) 564-8006 ext. 236; e-mail: pheying@mail.pa.state.ky.us

The Economy-Crime Rate Connection and Its Affect on DPA Caseloads: Does Crime Pay When the Market Doesn't?

The notion that the crime rate in a country is affected by the state of its economy has a common-sense appeal to most individuals. This belief would especially apply to the United States, where theoretically our free-market economy, with its relatively low-funded social programs compared to other Western democracies, leaves the underprivileged more at the mercy of changing market forces. According to this instinctual approach and most of the "economic" models of criminology, a flagging economy leads to more joblessness, less money for charity and "safety net" programs, and greater difficulty for individuals trying to find or maintain income to sustain the basic needs of their families. As a result, those individuals will more likely turn to criminal activity as a means of income for these basic needs, since the benefit of lawful activity no longer outweighs the risks of criminal activity (these risks, such as injury at the hands of a potential victim, incarceration, social and familial pressures against crime, etc., are viewed as the "costs" of criminal activity in the economic models).

From the perspective of the Department of Public Advocacy, increased crime caused by a bad economy, presumably committed inordinately by the economically disadvantaged, could have a significant impact on our individual and agency-wide caseloads. The current economic downturn has shown some signs of recovery, but the economic situation is not flying high like it was two years ago. Even if the situation merely stagnates, there is still cause for concern since any local, state, or national bumps in the economy usually hit the poor first and hardest.

Despite this common-sense reasoning, there is substantial debate among economists regarding the link between crime and the economy. The parties to the debate are usually divided and labeled into two familiar camps. Specifically, "conservative" economists minimize the link between economy and crime, arguing that committing a crime is more an individual choice or flaw, while "liberal" economists emphasize the role of institutions, family structure, and societal forces in the commission of crimes. Despite this debate, the majority of recent scholarly analysis has found that crime rates are directly related to the economy. The articles offer varying degrees of certainty on this point and even disagree about whether the relationship to economic factors only exists for property crimes (and not for violent crimes) or for all crimes. The two main relevant areas of analysis drawn from the research are (1) wages and unemployment generally, and (2) the 1990s economic "boom" and crime "bust" and what both can tell us about the crime/economy connection. Each segment within the two categories will focus on a specific scholarly writing on crime and the economy.

I. The Affect of Wages and Unemployment

The primary factor to be considered in the health of any free market economy is employment. Even if the top corporations in the United States were experiencing huge profits or the world was in a state of virtual peace, such gains would matter little to most Americans if they are severely underpaid or could not even find a job. Economists have performed extensive research into how our society is affected by meaningful employment and its absence. They have combined their efforts with those of criminologists to explore how fluctuations in the state of joblessness will impact the crime rate (or vice versa). Some of their findings are discussed below.

A. Local Market Opportunities

In their paper, "Crime Rates and Local Market Opportunities in the United States: 1979-1997," Gould, Weinberg, and Mustard concluded that both wages and unemployment are significantly related to crime, with wages having the stronger effect.[1] Since unskilled men commit the majority of crimes, the authors make this group the focus of their analysis.

The authors discuss how a decline in the wages offered increases the relative payoff of criminal activity, thus inducing workers to substitute away from the legal sector towards the illegal sector. A lower wage also reduces the opportunity cost of serving time in prison. A reduction in legal opportunities should make one more likely to engage in any form of criminal activity, regardless of motives. The propensity to commit crime moved inversely to the trends in the labor market conditions for unskilled men during the years reviewed (*i.e.*, more labor market opportunities means less likely to commit crime and less market opportunities means more likely to commit crime). Labor market conditions are important determinants of criminal behavior.

Increases in the wages of non-college men reduce the crime rate, and increases in the unemployment rate of non-college men increase the crime rate. Wages have a significant effect on both property and violent crimes, while unemployment remains significant for property crimes, but not for violent crimes.

Results indicate that crime responds to local labor market conditions, but long-term trends in various crimes are mostly influenced by the declining wages of less educated men throughout the period under review. The crimes with the weakest pecuniary motive among those surveyed, murder and rape, show the weakest relationship between crime and economic conditions.

The authors' estimates imply that declines in labor market opportunities of less-skilled men were responsible for substan-

tial increases in property crime from 1979 to 1993, and increased market opportunities were responsible for declines in crime the following years. Their findings were consistent when they looked at both larger national trends and individual cases.

B. Unemployment and Crime

In their first paper on "Identifying the Effect of Unemployment on Crime," Raphael and Winter-Ebmer found that the conventional wisdom on the effects of unemployment on crime (*i.e.*, a direct relationship – higher unemployment leads to higher crime and lower unemployment leads to lower crime) actually underestimates these effects.[2]

A decrease in income and potential earnings associated with involuntary unemployment increases the relative returns to illegal activity. Moreover, workers who experience chronic joblessness have less to lose by arrest and incarceration. Unemployment is an important determinant of the supply of criminal offenders and hence, the overall crime rate.

Previous estimates of the unemployment-crime relationship that do not control for important crime fundamentals (such as alcohol consumption, drug use, gun availability, and consumption of consumer durables) may systematically understate the effect of unemployment on crime. Specifically, the authors focus on (1) per-capita alcohol consumption, and (2) the strong relationship between military contract awards and state unemployment rates.

When controlling for the alcohol consumption factor, the effect of unemployment on violent crime is significant and comparable in magnitude to the effects on property crime. This is in contrast to previous research that didn't control for this factor and that found the same effect, but only in significant amounts for property crimes. Consideration of the military contracts factor also yields much larger unemployment effects for both specific property and violent crimes, even in the least restrictive specifications. The results for violent crime contradict the common finding in previous research that unemployment and violent crime are unrelated. The overall conclusion is that the relationship between crime and unemployment is considerably stronger than is suggested by previous research.

The authors cite Cook and Zarkin, *Crime and the Business Cycle* (1985), which identified four categories of factors that may create linkages between the business cycle and crime: (1) variation in legitimate employment opportunities, (2) variation in criminal opportunities, (3) consumption of criminogenic commodities (alcohol, drugs, guns), and (4) temporal variation in the response of the criminal justice system.

The authors conclude that, because the effect is so significant, policies aimed at improving the employment prospects of workers facing the greatest obstacles can be effective tools in combating crime. Also, they state that crime rates in the U.S. are considerably higher in areas with high concentrations of jobless workers and the fact that those workers with arguably the worst employment prospects are the most likely to be involved with the criminal justice system, employment-based anti-crime policies contain the attractive feature of being consistent with a wide range of policy objectives.

C. Implications for Public Policy

"The relationships between unemployment and crime are real; we won't be able even to begin an attack on crime that is both humane and effective if we do not confront them."[3]

In his book, "Confronting Crime: An American Challenge," Elliott Currie described the inextricable mutual effects of employment, crime, and public policy. He argued that the crime effects of unemployment are only partly due to the pressures of lost income, because unemployment also exacerbates drug and alcohol abuse. There is universal agreement that drug and alcohol abuse adversely impacts the crime rate for both violent and property crimes. Unemployment also disrupts family ties since the jobless often must migrate to find work, and these reduced family ties lead to higher crime rates. *Currie* at 107, citing sociologist M. Harvey Brenner of Johns Hopkins University.

The author points out that most research regarding the connection between joblessness and crime only takes into consideration those who are unemployed and are actively seeking work. If you include those who are both jobless and not searching for work, the association between joblessness and crime becomes even stronger. Currie at 110. Further, Currie notes that "what the narrow emphasis on the unemployment rate ignores is the larger, ultimately more crucial, issue of how the *quality* of work affects the crime rate." *Id.* at 111-112 (emphasis in original). Underemployment is more strongly associated with serious crime than unemployment. Underemployment is defined as "the prospect of working, perhaps forever, in jobs that cannot provide a decent or stable livelihood, a sense of social purpose, or a modicum of self-esteem." *Id.* at 112. The issue is economic viability, not just employment in and of itself. *Id.* (quoting economist Ann Dryden White)

Currie shows that quality of work is the key. The fundamental needs supplied by meaningful work are almost impossible to find in many of the jobs available, especially to the disadvantaged young. For work to avert crime, it must be a "part of the process through which the young are gradually integrated into a productive and valued role in a larger community." *Id.* at 117. Also, whether unemployment leads to crime is significantly influenced by whether the unemployment is a brief disruption of a path into this more productive and valued role, or "represents a permanent condition of economic marginality that virtually assures a sense of purposelessness, alienation, and deprivation." *Id.* The author argues that, if Americans desire a less "volatile and violent society," we must focus on improving the long-term prospects for steady and worthwhile employment for those individuals who are now largely excluded from such work.

As for the contention that welfare or other "social safety net" benefits lead many poor people to refrain from seeking active employment, Currie argues that "the problem is less that gov-

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ernment in the United States creates especially large *disincentives* to steady employment than that the labor market creates incentives so low and uncertain that they cannot consistently compete with the lures of street life." *Id.* at 123 (emphasis in original). Public policy is an intervening force between crime and unemployment. In other words, if (and how much) joblessness creates crime is determined by what awaits those who lose their jobs, especially in terms of public supports. Currie maintains that America's small degree of support for the unemployed compared to other Western industrial nations means that the American unemployed face "far more hardship, deprivation, and alienation" than in the other countries. *Id.* at 130.

Affects on Department of Public Advocacy caseloads could also be more long-term. Currie states that the focus should not be on merely the immediate impact of unemployment. Instead, it should be noted that the future effect of protracted unemployment has an equally important impact on criminal violence the following generations.

Therefore, in our agency, the effect of unemployment on crime is a crucial issue, both in terms of caseloads and future planning and strategy. A core tenet of our work is to protect the rights of the economically disadvantaged, and by extension improve and protect our society and criminal justice system. When the disadvantaged can't find a way out or up, it reveals the systemic inequalities that undermine our societal goals. Currie puts it best when he states that "The powerful connections between crime and the absence of secure and satisfying work suggest that the issue of employment and crime is woven inextricably into the larger one of the relationships between crime and inequality. For what is crucial about not having a decent job is that it puts one squarely at the bottom of what in the United States is a particularly harsh and pervasive structure of inequality that profoundly shapes every aspect of social and emotional life." *Id.* at 141.

II. The 1990s: Economic Boom and Crime Bust

A. The Economy as the Explanation for Crime Rates

In his lecture and article, "Does the Economy Help Explain the Fall in Crime?" (written before the current economic recession), Richard Freeman stated that the evidence supporting the relationship between crime and the economy is not unequivocal, and there are empirical problems that create some uncertainty. However, the preponderance of studies, particularly more recent econometric work, supports the claim that the 1990s booming economy helped reduce the crime rate.[4] In fact, the author cites three recent studies that found a substantial relationship between unemployment and crime, with a 1% change in unemployment associated with an approximate 2% change in crime rates.

Freeman found that the population of offenders consists disproportionately of people who have low legitimate job market opportunities. Whatever the source of data on crime – prisoners, arrestees, self-reports of criminal activity – the less skilled invariably are disproportionately represented. Although the overrepresentation of people with low earnings in crime could reflect psychological or decisionmaking problems among this population, studies show that people who commit crime are more likely to be unemployed (or idle when they are of school age) than others with comparable skills. Also, the same person is more likely to commit a crime when jobless than when employed. As additional support, Freeman discusses a prison inmate survey finding that offenders have a much higher unemployment rate than nonoffenders with, for example, similar skills and low education.

Many economists identify "incentives" as the major factor influencing whether an individual commits a crime. Whether one is a proponent of either the "labor market" or "sanctions" as the determinative factor is irrelevant according to the author. Both are viewed through the same decision calculus. Incapacitation aside, sanctions work by affecting incentives, just as legitimate and illegitimate earnings opportunities do. It may be that the stronger results that appear to come from sanctions merely reflect that fact that we have better ways of measuring sanctions than in measuring the economic rewards of crime for each individual.

Overall, the author identifies four factors that affect crime: (1) social mores and the way citizens view illegal behavior, (2) demand for drugs and other illegal activities, (3) criminal justice policies, and (4) the job market. In view of this article and the others cited, the "job market" is the factor among the four that can be most readily quantified, and thus lends itself to more reliable analysis. The resulting research clearly shows that wages and employment have an impact on local and national crime rates.

B. Homicide Rates During the 1990s Economic Boom

In their 1998 article, "Explaining Recent Trends in U.S. Homicide Rates," Blumstein and Rosenfeld argued that declining homicide rates in the 1990s were due to "current economic conditions" that apparently provided lawful economic prospects at the same time that prospects in the illegal drug markets were diminishing. However, the authors presciently cautioned that the "cyclical nature of economic conditions makes their crime reduction effects uncertain in the future."[5]

The authors warned that the 1990s decline in homicide rates could be reversed. Particularly, they felt that an increase in homicide rates could come with an economic downturn, with the downturn's accompanying resurgence in drug markets and their intertwined violence. Blumstein and Rosenfeld at 1216. Further, violence could increase in the most volatile communities as those least able to withstand an economic downturn are removed from the welfare rolls. *Id.*

The homicide data does much to support the idea that violent crime rates are also vulnerable to economic conditions. Most every researcher agrees that property crime rates are dependent on the economy, but it has always been more difficult to quantify this effect for violent crime rates. However, homicide data is considered among the most reliable forms of United

States violent crime data, since homicide records are generally meticulous and complete compared to other crimes, and the direct result of the crime – death – is easily defined and incontrovertible. Thus, since Blumstein and Rosenfeld have shown a relationship between the booming 1990s economy and the accompanying fall in homicide rates, it would be prudent to heed their warning that the inverse relationship could hold true during economic downturns as well.

C. The Economy as a Social Institution

In his article, "Social Institutions and the Crime 'Bust' of the 1990s," Gary Lafree examined six different American social institutions and measured their effect on the crime rate.[6] He studied political, criminal justice, economic, welfare, family, and educational institutions. Lafree determined that there was the strongest evidence of a connection between the 1990s decline in crime rates and increases in economic, criminal justice, and educational institutions. Lafree at 1367.

In his analysis of economic institutions, the author discusses the historically strong relationship between the economy and crime. While Lafree's (pre-recession) emphasis was on the 1990s drop in crime, he discussed the two main ways that "declining economic legitimacy" causes an increase in street crime rates: (1) by boosting the motivation of potential offenders to commit crime, and (2) by diminishing the success of social control aimed at crime prevention and punishment. *Id.* at 1359. Many economists recognize that the poor most keenly feel the effects of "declining economic legitimacy." As Lafree notes, "The idea that economic deprivation increases criminal motivation has long been central to strain theories in criminology. A large number of studies confirm that, compared to the wealthy, the economically disadvantaged are more likely to commit street crimes of every type." *Id.* at 1359-60. This further bolsters the evidence that the downturn in the economy will lead to greater indigent crime and resulting increased caseloads in our agency. Further, the current proof of a mild economic recovery in and of itself does not seem sufficient or sustained enough to reverse this prognosis.

Given Lafree's conclusions combined with the other research, a decline in the public trust or effectiveness of any of these three most relevant social institutions (economic, criminal justice, and educational systems) would lead to the opposite trend of that seen in the 1990s (*i.e.*, increased crime). As the economy has faltered, it is reasonable to assume that this could lead to increased crime. Further, important social institutions are interwoven, and the decline of the economy could impede the criminal justice or educational institutions. If all three languish, these mutual reductions will impact and feed off one another, creating a dangerous and potentially long-term cycle. The question is no longer "Will our caseloads increase?" but instead becomes "How could Department of Public Advocacy caseloads *not* increase?"

III. Conclusion

Since we are experiencing an economic downturn, the scholarly research indicates that it is reasonable to expect the potential for increased crime, especially among the underprivileged. Therefore, the Department of Public Advocacy (and public defenders across the country) could very well see an increase in caseload disproportionate to population growth. Further, given the long-term familial and sociological implications, the increase could extend into the future through subsequent generations whose members are raised in a heightened cycle of poverty and hopelessness.

Endnotes

1. Eric Gould, Bruce Weinberg, and David Mustard, "Crime Rates and Local Labor Market Opportunities in the United States: 1979-1997," working paper last revised October 2000. (This paper was originally presented to the *National Bureau of Economic Research Summer Institute Workshop*, Cambridge, MA, July 6, 1998, with data extending only to 1995, and it has since been revised with newer data).
2. Steven Raphael and Rudolf Winter-Ebmer, "Identifying the Effect of Unemployment on Crime," Department of Economics, University of California, San Diego, Discussion Paper 98-19, August 1998. The authors published a subsequent article using the same title last year: Steven Raphael and Rudolph Winter-Ebmer, "Identifying the Effect of Unemployment on Crime," Journal of Law and Economics 44 (April 2001): 259-83. The later article overlaps significantly with the earlier paper. However, the authors analyzed some new factors (such as a state-specific exposure to oil shocks) in new ways and de-emphasized the data on alcohol consumption. This new analysis continued to find significantly positive effects of unemployment on property crime rates. In fact, the authors state that just over 40% of the decline in the overall property crime rate between 1992 and 1997 can be attributed to the decline in unemployment. *Id.* at 281. However, these new variables did not find the same strong association between unemployment and violent crimes as were evident in the earlier paper, but did find that the employment prospects of males are weakly related to rape rates. Despite the two divergent analyses presented by the authors, both writings strongly support the "property crime-unemployment" connection, and either text leads to a projection of increased DPA caseloads concomitant with increased unemployment.
3. Elliott Currie, *Confronting Crime: An American Challenge* (New York 1985): at 106.
4. Richard B. Freeman, "Does the Economy Help Explain the Fall in Crime?," from lecture given February 23, 2000 for the *Perspective on Crime and Justice: 1999-2000 Lecture Series*, National Institute of Justice, March 2001. (Freeman is a Professor with the National Bureau of Economic Research at Harvard and Professor for the Centre for Economic Performance, London School of Economics.)
5. Alfred Blumstein and Richard Rosenfeld, "Explaining Recent Trends in U.S. Homicide Rates," The Journal of Criminal Law & Criminology 88, No. 4, *Symposium: Why is Crime Decreasing?* (Summer 1998): 1175-1216, at 1216.
6. Gary Lafree, "Social Institutions and the Crime 'Bust' of the 1990s," The Journal of Criminal Law & Criminology 88, No. 4, *Symposium: Why is Crime Decreasing?* (Summer 1998): 1325-1368..

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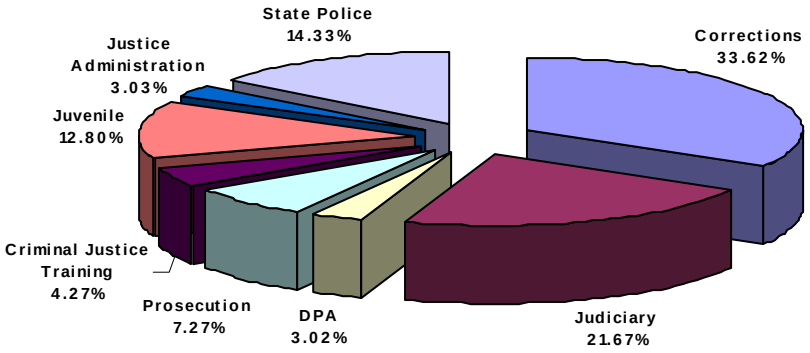
Revised Kentucky Criminal Justice Appropriations in FY 2002

For the Fiscal Year 2002 (July 1, 2001 - June 30, 2002), revised criminal justice appropriations in Kentucky are almost $949 million, which is 5.48% of monies spent by the Commonwealth. This is up from FY 2000 when there was $830 million or 5.43%. Final Budget Memorandum (www.lrc.state.ky.us/ home/agency.); (http://162.114.4.13/budget/final/vol.1 pg.26). Appropriations for all of state government in FY 02 is over 17.321 billion dollars. The FY 02 criminal justice appropriations (including budget reductions) of $948,790,800 were divided as follows:

Corrections	319,005,800	33.62%
Judiciary	205,591,800	21.67%
State Police	135,924,300	14.33%
Juvenile	121,412,100	12.80%
Prosecution	69,007,300	7.27%
Criminal Justice Training	40,505,600	4.27%
Justice Administration	28,724,200	3.03%
DPA	28,619,700	3.02%
Total	948,790,800	100%

Percentage of Criminal Justice Appropriations for Each Kentucky Criminal Justice Program:



From FY 00 to FY 02, funding for Kentucky prosecutors increased $5 million from $64 million to $69 million. During this period, the prosecutors' percentage of the funds allocated to Kentucky criminal justice agencies increased from 7.23% to 7.27%.

From FY 00 to FY 02, funding for Kentucky defenders increased from $22.9 million to $28.6 million. During this period, defenders' percentage of the funds allocated to Kentucky Criminal Justice agencies increased from 2.70% to 3.02%. However, DPA has the least funding in FY 02 of any of the criminal justice categories listed.

In FY 02, Corrections has the most funding of Kentucky criminal justice agencies with $319 million (or 33.62%), up from $307 million in FY 00. That means that over $ .33 of every dollar appropriated for Kentucky criminal justice programs goes to Corrections, excluding incarceration of juveniles.

State Police is appropriated over $.14 of every criminal justice dollar, and the Department of Juvenile Justice is appropriated nearly $ .13 of every dollar that goes to criminal justice programs in FY 02. Prosecutors receive $ .07 and defenders receive $.03 of every dollar appropriated for Kentucky criminal justice programs.

The Department of Public Advocacy's budget increase of $5.7 million from FY 00 to FY 02 providing defender clients and the criminal justice system with a statewide public defender system significantly more capable of doing its part to provide a fair process and reliable results.

While defenders have received much needed new funding, there is unfinished business to insure this fairness and reliability for the future within a level playing field of resources.

Looking at defender funding and prosecutor funding in the context of funding for the criminal justice system provides perspective on remaining defender funding needs. ■

New Study Supports Bill to End Juvenile Death Penalty

FRANKFORT, February 15, 2002: A new study from Columbia University offers strong support for legislation now pending before the Kentucky General Assembly advocating the elimination of death as a penalty for 16 and 17 year olds.

House Bill 447, sponsored by Rep. Robin Webb, D-Grayson, and Senate Bill 127, sponsored by Sen. Gerald Neal, D-Louisville, were introduced January 22, 2002 and assigned to the Judiciary Committees of their respective chambers. However, neither bill has been called for a committee vote yet "despite the fact that the people of Kentucky overwhelmingly want the law changed now," said Webb.

Neal and Webb cited "The Spring 2000 Kentucky Survey" conducted by the University of Kentucky Survey Research Center, which found that eight out of 10 Kentuckians do not support the death penalty for 16 and 17 year olds.

That information joins a growing body of support for outlawing the death penalty for people under age 18. In June 2000, Columbia University Professors James. S. Liebman and Jeffrey Fagan released their report "A Broken System: Error Rates in Capital Cases 1973-1995," which found that 68% of all death verdicts imposed and fully reviewed during the study period were reversed by the courts.

Now a follow-up study, "A Broken System, Part II; Why There Is So Much Error in Capital Cases and What Can Be Done About It;" examines the causes of error in capital cases.

The study's conclusion that the death penalty must be reserved for only "the worst of the worst" has significance for Kentucky, said Neal.

"When a state makes too many cases eligible for the death penalty, the rate of error in capital convictions skyrockets," he said. "Kentucky has a net that is too wide and the facts show that the error rate is unacceptable," said Neal, noting that Kentucky has had 62% of its capital convictions reversed.

To reduce the risk of error, the study recommends carefully targeted reforms designed to fit local conditions, and aimed at ensuring that the death penalty is limited to "defendants who can be shown without doubt to have committed an egregiously aggravated murder without extenuating factors;" according to the study. For example, the death penalty should be banned for juveniles and people who are mentally retarded or severely mentally ill, the study said.

Rep. Robin Webb

Senator Gerald Neal

This recommendation echoes other studies by national bipartisan groups and international law, said Webb. Among the groups opposing the death penalty for juveniles are the American Bar Association and the Constitution Project, a 30-member death penalty initiative group whose diverse membership includes Democrats, Republicans, liberals, conservatives and people from both sides of the death penalty issue, she said.

"We do not want Kentucky to make a mistake in killing its kids, and study after study by national and international bipartisan groups tells us that we should not kill kids;" said Webb. "It's time to change the law. Let's not block the will of the people of Kentucky."

Neal echoed Webb's call for legislation banning juvenile executions. "The time to fix this serious defect in Kentucky's law is now," he said. "This latest study confirms what the people of Kentucky already know: we should not be killing our children." ■

KY Defender Caseloads Increase This Fiscal Year

Field office workload numbers reported in the Trial Division have risen substantially for the first two quarters of Fiscal Year 2002 compared to the same period last fiscal year. Field office workload was 48,270 cases, compared to 42,393 cases reported at mid-year in Fiscal Year 2001, an increase of 13.86%. Additionally, overall Trial Division caseload reported for the mid-year Fiscal Year 2002 is 50,608 cases, compared to 44,490 cases mid-year in Fiscal Year 2001, an increase of 13.75%.

Race and the Criminal Justice System

Kentucky's Racial Profiling Protections. At DPA's 2001 Annual Public Defender Conference seminar, I was part of a panel discussion on race with Senator Gerald Neal, Representative Jesse Crenshaw, and U of L Professor Gennaro Vito. At that time, I raised the question of whether the Racial Profiling Act of 2001, which was sponsored by Senator Gerald Neal and which is now codified in KRS 15A.195, could be used to suppress evidence seized during the course of its violation.

Part of this statute reads: "1) No state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person."

I argued at that time that this statute carried within it implicitly an exclusionary rule. I have yet to read a case, or even hear of a challenge, testing my argument. However, Andy Johnson, summer law clerk for the Owensboro Office, has written a short memo to Rob Sexton, Central Region Manager, on whether the Racial Profiling Act of 2001 can support a motion to suppress. He states that because the Racial Profiling Act of 2001 represents a finding by the Kentucky General Assembly that racial profiling exists, that courts may "create a common law rule of exclusion barring the use of evidence obtained as a result of racial profiling." He notes that the penalty for violating KRS 15A.195 is "an administrative action (that) shall be in accordance with other penalties enforced by the agency's administration for similar officer misconduct." He notes further that the Court of Justice may make rules governing practice and procedure so long as the rules are consistent with public policy.

I encourage all defenders to use KRS 15A.195 where evidence of racial profiling exists to urge the court to suppress evidence, arguing that they have the right to create a rule of exclusion consistent with this clear public policy expression in KRS 15A.195. It would be peculiar if a matter of such importance and so formally enacted into our statutory public policy had no remedy if violated.

Racial Aspects of 4th Amendment Law. Professor Amy D. Ronner of St. Thomas University School of Law has written a law review article entitled *Fleeing While Black: The Fourth Amendment Apartheid*, 32 Columbia Human Rights Law Review 383 (2001) in which she reviews *Illinois v. Wardlow*, 528 U.S. 119 (2000). A few quotes from this incisive and provocative article will give the reader reason to explore it further.

"The law not only allows police harassment of minorities, but also seems to encourage it. Courts have specifically approved race as a factor in the decision to stop and detain individuals. Also, drug courier profiles have included race as a characteristic that officers may use to justify pretextual traffic stops and subsequent searches. Further, the concept of 'reasonable suspicion' itself is a culprit because it is subject to a 'totality of the circumstances' analysis, which allows such a vast panoply of factors and inferences that it can easily mask police officers' racial prejudices. In addition, courts are increasingly deferential to officers' discretion in making decisions about stops and searches. The ultimate effect is to allow police officers' subjective perceptions and biases to corrupt the law of search and seizure."

Senator Gerald Neal

Rep. Jesse Crenshaw

"The seminal decision in *Terry v. Ohio* is the foundation upon which the Supreme Court has built its racially biased Fourth Amendment jurisprudence…In *Terry*, the NAACP Legal Defense and Educational Fund had submitted an *amicus* brief in which it asserted that the police were more likely to stop and frisk blacks than whites…The *amicus* brief thus pointed out that the failure to protect citizens like Terry would not only harm the black population by increasing its exposure to police harassment, but would also augment extant racial tensions. The NAACP's solution was to make stops and frisks subject to the same probable cause standard as searches and seizures."

"While the Supreme Court laid the foundation for a racist Fourth Amendment in *Terry v. Ohio*, it only recently—over three decades later—installed the roof. While the Terry Court proclaimed the Fourth Amendment to be impotent against the 'wholesale harassment' of blacks, the recent W*ardlow* decision is less passive. In *Wardlow*, the Court takes an apartheid approach to the Fourth Amendment and actively condones police harassment of minorities."

"In *Florida v. Royer*, the Supreme Court held that individuals approached without reasonable suspicion or probable cause have the right to ignore the police and walk away. Similarly, in *Florida v. Bostick*, the Court said that a 'refusal to cooper-

ate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.' The *Wardlow* Court, with negligible analysis, recited that 'unprovoked flight is simply not a mere refusal to cooperate' and that '[h]eadlong flight—wherever it occurs—is the consummate act of evasion.' This proposition is not just a lie, but a fraud, one perpetrated on the minority community."

"When the encounter is between a police officer and a minority, the dynamics are magnified. While the average white citizen does not usually feel free to simply walk away from a police officer, the average black or Hispanic citizen feels practically shackled. Images from remote and recent history begin to project themselves on the screen of the mind, emitting the at least subliminal message that this is a potentially life-threatening encounter. For minorities, a police detainment can conjure up a panoply of devastating scenarios, ranging from plain humiliation, to framing towards an unjust conviction, to brutal beating or death. The detainee's reasonable response is to run. That response is not *un*provoked, but in fact one hundred percent provoked."

"In essence, what the *Wardlow* Court has done, despite its own denials, is set up a pat formula—high crime area plus flight equals stop. Each of the prongs, however, targets minorities, who are the ones' sentenced by segregation to live in inner city, "high crime" areas,' and the ones most apt to flee when the police arrive. The decision not only perpetuates the evasion-search vicious cycle, but amounts to a redundant edict that the Fourth Amendment is simply not available to minorities. The *Wardlow* decision makes the sacred protection a whites-only amendment. What this means, of course, is that the Fourth Amendment cannot serve the very class of people that needs it most."

"[T]he Supreme Court must confront its own racism and cultivate a genuine sensitivity to minority concerns and actually *hear* the concerns of the minority victims, as it did not in *Terry*. The Court must apply race-neutral justice, and not deem the exclusionary rule, designed to curtail police misconduct, ineffective when it comes to police harassment of minorities." ■

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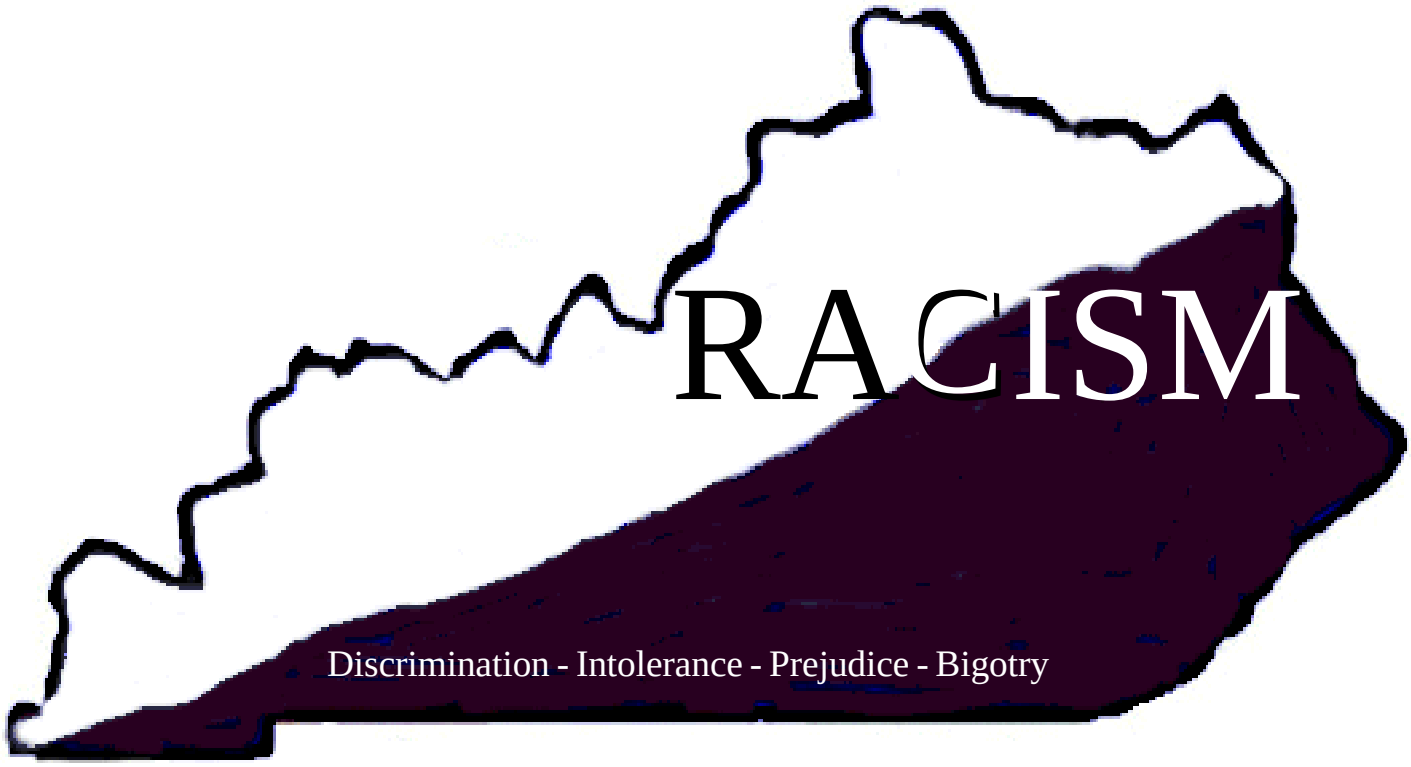

AVOIDING OR CHALLENGING A DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER

John H. Blume and David P. Voisin

It's an all-too-familiar scenario in capital litigation. The prosecution moves for a psychiatric evaluation to assess a defendant's capacity to stand trial and criminal responsibility. The state evaluators review incident reports of the offense as well as the defendant's adult and juvenile criminal record—if any—interview the defendant and perhaps a family member or two, and possibly administer an IQ test and a personality assessment, probably the MMPI, and a few "projective" tests. Their diagnosis: antisocial personality disorder ["APD"]. This can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath.[1] Or as the "ubiquitous Dr. Grigson"[2] would state, the defendant has "a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence."[3] The state's expert will also explain that those with APD are deceptive, manipulative, and violent and show no remorse for their actions. The prosecution will remind the jury of this expert medical evidence in closing argument, telling the jury that the defendant is simply too dangerous and evil to spare and that the defendant's attempts to present mitigating evidence are nothing more than the contrived attempt of a manipulator to con them. Or as one prosecutor argued:

> You heard crazy like a fox and I think that's what a sociopathic personality is. . . . Sociopathic personality is what fits here, some guy that if he wants — he gets what he wants or he creates problems for people, a guy that is either going to get what he wants in the future in prison or he's going to create problems for people, and those jailers are living human beings with careers and lives on the line.[4]

Too often, it is the defense mental health expert who concludes that the defendant has APD. As a result, counsel may decide to forgo presenting any expert testimony on the client's behalf in order to avoid having the jury learn from a defense expert that the defendant may be a sociopath.[5] Without expert assistance to help them understand his actions, however, jurors will likely sentence the defendant to death.[6] At that point, it will be difficult to obtain relief on appeal or in post-conviction proceedings based on issues centering on the defendant's mental state. For instance, if trial counsel sought expert assistance and then made a decision not to conduct additional investigation or present much evidence, a reviewing court will almost always find that counsel made a reasonable, strategic decision. For example, in *Satcher*, trial counsel retained a psychiatrist and psychologist, both of whom diagnosed the defendant having APD. As a result, counsel opted not to investigate further and instead relied on testimony from family members. The reviewing court found that counsel's decisions were reasonable under the circumstances.[7]

The APD diagnosis is not only harmful, but it is frequently wrong. Sometimes the error rests on a misunderstanding of the disorder. At times, it is erroneously diagnosed because of an over-reliance on personality tests, a failure to consider the defendant's culture and background, or an inaccurate or incomplete factual basis. Too often, mental health professionals conclude that a defendant has APD for no other reason than he has been accused of a heinous crime and may have previously committed bad acts, and the experts make no effort to understand the context in which the actions took place. In short, it is often "the lazy mental health professional's diagnosis."[8]

Many experienced capital litigators, especially in Texas, are no stranger to this sort of drive-by evaluation. For example, in *Chamberlain v. State*,[9] the defendant was convicted of sexually assaulting and murdering a neighbor. Evidence of his guilt was not uncovered until six years after the crime. At the penalty phase, the defense argued that he had a nonviolent past. The state, however, introduced evidence of an attack against a fellow soldier, an attack on a woman at a shopping mall, and the burglary of a pornography shop. The state then called a psychiatrist to testify that "the facts of the offense reveal a sexually sadistic, antisocial personality disorder."[10] There is very little in the court's opinion that suggests that the defendant actually met the criteria for APD.

Likewise, in *White v. Johnson*,[11] the prosecution's psychiatrist testified that the defendant had APD. This conclusion was based on the circumstances surrounding the offense, the defendant's alleged lack of remorse shortly after his arrest, and testimony that he had beaten a former spouse.[12] Although the facts of the offenses for which he was convicted were gruesome, the state's expert could point to little else that supported the criteria for APD. Both *White* and *Chamberlain* illustrate two common deficiencies with drive-by type diagnoses of APD: there is nothing about the defendant's conduct prior to age fifteen, and little or no evidence of repeated and pervasive antisocial conduct.

By understanding the criteria for identifying personality disorders in general and APD in particular, and by conducting a thorough and reliable social history, defense attorneys can often avoid and always be prepared to legitimately challenge an APD diagnosis. We will first identify the criteria for APD. We will also focus on critical features of APD that are often overlooked but which are necessary predicates to an accu-

rate diagnosis. We will then suggest ways to attack a state expert's conclusion that the defendant client has APD and recommend several courses of action that will help ensure that defense experts do not make the same mistakes that the state experts made.

What is Anti-Social Personality Disorder?

Diagnostic Criteria for Antisocial Personality Disorder

According to the Diagnostic and Statistical Manual, Fourth Edition ["DSM-IV"], "[t]he essential feature of Antisocial Personality is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."[13] DSM-IV provides a number of criteria that must be met before an evaluator should conclude that a patient has APD:[14]

A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:
   (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
   (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
   (3) impulsivity or failure to plan ahead
   (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
   (5) reckless disregard for safety of self or others
   (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
   (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another
B. The individual is at least age 18 years.
C. There is evidence of Conduct Disorder with onset before age 15 years.
D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode.

At first blush, these criteria seem fairly broad and damning to many capital defendants. However, they contain very important limitations and exclusions that are often ignored or overlooked. First, APD requires that a defendant be at least eighteen years of age. Second, there must be evidence of a Conduct Disorder before age fifteen. Failure to meet these criteria eliminates APD as a diagnosis. Similarly, a mental health professional should first consider the possibility of organic impairments or other serious mental illnesses or disorders before finding a defendant to have APD. Finally, one of the most important limitations of APD that is frequently not considered is that an accurate diagnosis requires evidence of traits that "are pervasive (that is, present in a wide range of situations), distressing or impairing, of early onset, and enduring."[15] That is to say, there must be numerous examples of antisocial acts in a wide variety of contexts over a period of time before APD may qualify as an appropriate diagnosis. We shall discuss these exclusions and limitations in more detail.

Age-Related Exclusions and Limitations on an APD Diagnosis

A. The Defendant Must be at Least Eighteen Years of Age.

The diagnosis should not be made if the defendant is under age eighteen. Generally speaking, "the definition of a personality disorder requires an early onset and long-term stability."[16] Prior to age eighteen, personalities are often not well-developed, and problematic traits observed during adolescence may disappear during early adulthood.[17] At most, juvenile defendants can be said to have a Conduct Disorder.[18] And even then, there are a number of limitations on that diagnosis for juveniles, including evidence of a pattern of misconduct and not merely isolated bad acts, a need to understand the context in which the actions took place, and a consideration as to whether the actions stemmed from a more serious underlying mental illness or disorder.

B. Evidence of Conduct Disorder Before Age Fifteen

Experts frequently gloss over this criterion for APD, often concluding that a defendant has APD with little or no information concerning the defendant's life prior to age fifteen. Under the DSM-IV criteria, a defendant absolutely cannot be classified as having APD unless he has a history of symptoms of Conduct Disorder before that age. Conduct Disorder "involves a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated."[19] DSM-IV requires the presence of three (or more) of the following criteria in the past 12 months, with at least one criterion present in the past 6 months:[20]

Aggression to people and animals:

(1) often bullies, threatens, or intimidates others
(2) often initiates physical fights
(3) has used a weapon that can cause serious physical harm to others (*e.g.*, a bat, brick, broken bottle, knife, gun)
(4) has been physically cruel to people
(5) has been physically cruel to animals
(6) has stolen while confronting a victim (*e.g.*, mugging, purse snatching, extortion, armed robbery)
(7) has forced someone into sexual activity

Destruction of Property:

(8) has deliberately engaged in fire setting with the intention of causing serious damage

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(9) has deliberately destroyed others' property (other than by fire setting)

Deceitfulness or theft:

(10) has broken into someone else's house, building, or car
(11) often lies to obtain goods or favors or to avoid obligations (*i.e.,* "cons" others)
(12) has stolen items of nontrivial value without confronting a victim (e.g., shoplifting, but without breaking and entering; forgery)

Serious violations of rules:

(13) often stays out at night despite parental prohibitions, beginning before age 13 years
(14) has run away from home overnight at least twice while living in parental or parental surrogate home (or once without returning for a lengthy period)
(15) is often truant from school, beginning before age 13 years.

DSM-IV adds that the disturbance in behavior must cause "clinically significant impairment in social, academic, or occupational functioning. Finally, DSM-IV notes that if these criteria are not evidence until an individual is over eighteen years of age, the criteria for APD cannot be met.[21]

Defense counsel must pay particularly close attention to these criteria. Many children commit isolated occurrences of antisocial behavior without repeatedly violating the law or social norms, especially in reaction to a serious disruption in their family or school life.[22] The fact that a defendant was in a fight, bullied someone on a couple occasions, or cut school a few times should not count against him, except perhaps as a diagnosis of Oppositional Defiant Disorder or Disruptive Behavior Disorder.[23] If an occasional antisocial act prior to age fifteen is the only basis for determining that the defendant had a Conduct Disorder, then the expert was wrong to diagnose APD, yet this happens all the time.

It is also essential to be familiar with the context in which any bad acts or rules violations took place. The DSM-IV acknowledges that APD is more often found in those of low socioeconomic status and in urban settings, and thus there are concerns that the diagnosis has been applied "in settings in which seemingly antisocial behavior may be part of a protective survival strategy."[24] As a result, it cautions experts to consider "the social and economic context in which the behaviors occur."[25]

For example, children may run away from home if they are being physically or sexually abused. A young adolescent may steal or sells drugs to obtain money to meet basic needs. Similarly, a client who grows up in a violent area may join a gang and participate in gang-related unlawful activities because it is his way of coping with the harsh circumstances of his surroundings. The mentally retarded or those with severe learning disabilities sometimes skip school to avoid the pervasive sense of always being a failure.[26] Though these are unlawful or undesirable activities, they reflect not so much an enduring and inflexible personality trait of the client but his method of coping with difficult circumstances. They should not factor into a diagnosis of Conduct Disorder.

Counsel must also consider whether the antisocial act was the product of a more severe mental illness or disorder. For example, psychotic disorders, especially with paranoid symptoms or hallucinations, may explain aggression, destruction of property, or running away.[27] "In general, extremely violent behavior, especially if unpredictable and unjustified, should raise the suspicion of an underlying psychotic disorder or of specific brain pathologies, such as seizure disorders, tumors, subacute encephalitis, tuberous sclerosis, and dissociative illnesses."[28] Similarly, children with attention deficit/hyperactivity disorder may at times be disruptive. Finally, children and adolescents may react aggressively and exhibit hypervigilance in response even to trivial events because they have posttraumatic stress disorder as a result of physical and sexual abuse.[29] The defendant's antisocial acts committed prior to turning fifteen that are attributable to another mental disease or disorder should not lead to a diagnosis of Conduct Disorder.

Many clients have committed bad acts prior to age fifteen; of these, however, a large number did not engage in significant or repeated antisocial conduct. Regardless, then, of what they may have done after turning fifteen, these defendants do not fit the criteria for APD. And even for those who may at first glance meet the Conduct Disorder criteria, thorough and reliable investigation of the defendant's early life will uncover mental illnesses, disorders, or severe trauma that frequently explain the misconduct. If defense counsel can explain childhood and early adolescent misconduct and avoid a finding of a Conduct Disorder, the defendant should not be diagnosed with APD.

Other Limitations on an APD Diagnosis

Besides the age-related exclusions, the other specific criteria for APD contains a number of other significant limitations.

A. There Must be a Pattern of Antisocial Acts

Too often, clinicians, judges, and lawyers view the APD criteria as nothing more than a checklist of antisocial acts. If a client has committed several prior bad acts, then he is antisocial. It is simply wrong, however, to equate several antisocial acts with APD. Category A of the APD criteria lists a number of types of antisocial acts, including unlawful behaviors, lying, impulsivity, irritability or aggressiveness, reckless disregard for the safety of self or others, irresponsibility, and lack of remorse. What is often overlooked is that the criteria explicitly require evidence of "*repeatedly* performing acts that are grounds for arrest," or "*repeated* lying," or "*repeated*

physical fights or assaults." Thus, even if the state's experts or the defense's own experts uncover evidence that the defendant committed prior criminal acts or lied to someone or got into a fight, without reliable evidence that he repeatedly engaged in the antisocial acts, he would not meet the criteria for APD. This is obviously a critical area to be aware of because most people, and not just capital defendants, have engaged in antisocial acts in their lifetimes, but no one would jump to the conclusion that they have APD.

B. The Context and Motivation for the Antisocial Acts.

A repeated pattern of a variety of antisocial acts may be necessary for an APD diagnosis, but it is hardly sufficient. It answers only what the client did but does not explain why. As discussed in the context of Conduct Disorder, experts and defense counsel must consider the circumstances under which the bad acts took place. APD is supposed to characterize those who are deceitful or manipulative and who act for personal gain or pleasure without regard for the feelings of others.[30] Those with APD are said to "lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others. They may have an inflated and arrogant self-appraisal . . . and may be excessively opinionated, self-assured, or cocky."[31]

These concerns should lead a clinician and defense counsel to investigate the defendant's past in greater detail to learn what was driving his conduct at the time. Did the defendant commit thefts or burglaries for the thrill of it or to obtain money to run away from an abusive home? Or was he pressured by older siblings or a parent to participate in a robbery? Did the defendant get into fights out of a sense of loyalty or obligation to a gang that everyone felt pressured to join? Or is there any evidence that he initiated fights for no reason. Even though the defendant may have performed bad acts, he may not have done so for purely personal reasons or for reasons that do not make sense under the circumstances in which they took place. Understanding why certain acts took place may uncover more sympathetic mitigating evidence and also rule out APD.

Another way to approach this is to recall that under the APD criteria, antisocial acts must be pervasive, that is, present in a wide range of situations. If the defendant acts out only when he is with other gang members but does not otherwise get into fights or break the law when with other people or with his family, the motivation behind the defendant's actions may have little to do with his personality traits but is a response to his environment. Thus, "[a]ntisocial personality disorder must be distinguished from criminal behavior undertaken for gain that is not accompanied by the personality features characteristic of this disorder."[32]

C. Differential Diagnoses

Many defendants suffering from schizophrenia, other serious mental illnesses, or substance dependence have engaged in unlawful or antisocial acts. Likewise, several of the criteria for other personality disorders, such as borderline personality disorder, schizotypal personality disorder, narcissistic personality disorder, are similar to the criteria for APD. If an expert and defense counsel do little more than count the number of antisocial acts that the defendant committed, they may not realize that the defendant is suffering from something much more serious and more mitigating in the eyes of the jury. In addition, as a general rule, experts may generally not diagnose APD if there is evidence of other disorders affecting conduct.

APD should not be diagnosed if antisocial acts result from organic causes, occur exclusively during an episode of an Axis I or clinical disorder, or are not typical of the individual's long-term functioning.[33] In fact, one of the criteria for APD is that the occurrence of antisocial behavior is not exclusively during the course of schizophrenia or a manic episode.[34] This also highlights the need to investigate whether the defendant may have brain damage and ensure that he has undergone a reliable battery of neuropsychological tests. An evaluator should also consider when the defendant's antisocial actions began. If antisocial acts did not begin until the defendant was exposed to severe trauma or extreme stress, it is possible that he is suffering from posttraumatic stress disorder and thus the undesirable acts would not reflect his inherent personality traits.

Distinguishing APD from other personality disorders is difficult, especially since many personality disorders have similar criteria. For instance, those with a narcissistic personality disorder also tend to be tough-minded, superficial, glib, and exploitative. They, however, do not tend to be impulsive. Those with borderline personality disorder are often manipulative. They, however, aim to gain nurturance, whereas those with APD tend to be manipulative for profit or power and are more emotionally stable. Individuals with Paranoid Personality Disorder or paranoid schizophrenia, by contrast, are sometimes motivated by revenge.[35] Some of these more subtle differences between APD and other personality disorders demonstrates the need for a careful investigation not only into what the defendant may have done but also why he did it.

An APD diagnosis is also problematic if the defendant has a substance-related disorder. DSM-IV cautions against basing a diagnosis of any personality order solely "on behaviors that are the consequence of substance intoxication or withdrawal or that are associated with activities in the service of sustaining a dependency."[36] In fact, APD should not be diagnosed at all for an adult with a substance-related disorder unless signs of APD were already apparent in childhood and continued into adulthood.[37] Many clients suffer from chronic and long-standing alcohol and other drug related disorders. They may have to steal or sell drugs to satisfy their own needs. They may not get into fights unless

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they are drunk. Alcohol, especially in conjunction with some types of brain damage, may impair a defendant's ability to think through the consequences of his actions and cause him to be more impulsive. If all or most of the defendant's antisocial conduct is linked somehow to dependence on alcohol or other drugs, several of the APD criteria may not be applicable.

Avoiding a Defense Diagnosis of APD

An APD diagnosis by a defense expert almost always results from a lack of diligent and thorough investigation into the client's social history. Even good lawyers occasionally take steps that lead to APD. Although expert assistance is almost always needed in a capital case, it is often not wise to send in a psychiatrist at the outset of the investigation. At that time, the defense psychiatrist will know only what the state evaluators usually know: the defendant committed a horrible crime and perhaps has a prior criminal history. Knowing only a list of antisocial acts in the defendant's past, even well-meaning experts may begin to think of APD in the absence of additional information, including details that explain or mitigate some of the prior bad acts. Once an expert begins to entertain the possibility that the defendant has APD, the expert may later be resistant to changing his or her initial impression.

Counsel should also avoid having the defendant undergo personality tests, such as the MMPI, or projective tests. These tests are not designed for client's with the history of most capital defendants. Many defendants will score high on antisocial traits and appear to be manipulative and deceitful when they are in fact being candid. In particular, defendants who are tested under stressful conditions, *e.g.*, shortly after being incarcerated, tend to endorse a large number of extreme symptoms. Thus, they erroneously come across as malingering and manipulative.[38] In addition, defendants from different cultural backgrounds may have elevated scores on various scales. Similarly, defendants with low intelligence, reading problems, or other impairments may not understand all of the questions or may respond inconsistently to different items, which again may make them appear to be malingering and therefore deceitful.[39] There is a real danger that experts will use the tests as a window into the mind of the defendant and conclude that he has the personality traits of a sociopath. In turn, the jury will likely be swayed by seemingly "objective" evidence of the defendant's antisocial personality.

If counsel should not send in experts immediately or administer various personality tests, what should be done? The simple answer is that counsel should follow the five step process recognized as providing the requisite standard of care to assure that the client receives a competent and reliable evaluation.[40] The first step is to obtain an accurate medical and social history. Second, counsel must obtain other historical data not only from the client but from independent sources. Thus, defense counsel will require funds for a mitigation investigator to collect school, employment, military, medical, psychological, and all other records pertaining to the client and his family. An investigator will interview the client, close family members, friends, acquaintances, teachers, employers, and anyone else who was close to the client and his family.[41] Third, the defendant should undergo a physical examination, including a neurological evaluation. Fourth, depending on the client's history and results of the physical examination, counsel should decide which additional diagnostic studies are required. Often, this will involve neuropsychological testing, especially if the client has a history of head injuries, trauma, learning disabilities, or other problems or diseases affecting the brain. In addition, the defendant may require an MRI, CT scan, EEG, or other neuroimaging procedures. Finally, counsel should be aware that the standard mental status exam cannot be relied upon in isolation for assessing the presence of organic impairment. The standard mental status examination may not detect more subtle signs of organic impairment. To accurately assess the presence of these types of problems, the examiner must consider all of the data collected. Once defense counsel has assembled this information, counsel can show the expert whether there is any evidence of a Conduct Disorder before age 15. Counsel will be able to apprise the psychiatrist whether the defendant was subjected to overwhelming trauma or can point to hospital records documenting brain injury or exposure to neurotoxins. The expert will also have access to well-documented information concerning the client's alcohol and drug history. Counsel may be able to establish that the defendant has experienced hallucinations or delusions. Counsel will be able to document the environmental factors that shaped the defendant's life choices. For example, the expert may learn that the defendant used alcohol to blunt the trauma of being sexually abused, and that he began skipping school at a young age to drink. In sum, counsel will uncover facts such as organicity or psychosis that will exclude APD or that will put the defendant's actions in a more sympathetic light.

In prior psychiatric or psychological evaluations, some defendants may have already been diagnosed as having APD or a Conduct Disorder. That, however, should never be taken as the last word on the defendant's mental condition. Those prior evaluations usually suffer the same infirmities as court-ordered evaluations in capital cases: insufficient facts, inadequate investigation, or inattention to the specific criteria. A defendant may even have been labeled as having a Conduct Disorder, as opposed to a mental illness, when he was a juvenile to save the state the expense of having to offer mental health care.[42] Moreover, juvenile and other facilities may also have been the setting for trauma that cause serious mental disorders.

The take home message is that there are no short cuts. Nothing less than a comprehensive social history can provide the data needed to make a reliable and more favorable diagnosis and avoid a diagnosis of APD. It is also the only way to have

a meaningful chance to rebut an APD diagnosis by the state's experts. The credibility of the state's expert will be undermined only if the defense can present reliable and independently corroborated evidence either excluding APD or ruling out several of the criteria supporting the state expert's conclusions. Without evidence that specifically rules out various criteria or knocks out APD altogether, the jury will be left with the picture that the defendant is, by nature, violent, manipulative, and remorseless.

Attacking the State's Finding of APD:

Clearly, APD is the state's preferred diagnosis. It enables the prosecution to present expert evidence that the defendant has had a "pervasive pattern of disregard for, and violation of, the rights of others that beg[an] in childhood or early adolescence and continue[d] into adulthood."[43] In other words, the defendant was, is, and will continue to be mean, violent, and remorseless. Can defense counsel do anything to prevent or dilute this type of testimony?

In some states, state experts may be limited to evaluating a defendant's capacity to stand trial and criminal responsibility.[44] Defense counsel should oppose prosecution motions to have the defendant evaluated if the prosecution cannot show a basis to question the defendant's competency or unless counsel believes that there may be a question of competency. Counsel should also move to prohibit the introduction of state expert testimony that exceeds the scope of the initial commitment order.

State evaluations that exceed the limited scope of the trial court's order for competency and criminal responsibility evaluations may also raise Sixth Amendment concerns. The defense is entitled to notice about the specific purpose of an evaluation so that counsel can advise the defendant accordingly. Counsel cannot perform this function if the prosecution misuses the court-ordered evaluation to gain additional information beyond the express scope of the evaluation to use at the penalty phase, for example evidence of future dangerousness or evidence that the defendant meets several of the criteria for APD.[45] Therefore, if the defendant has been sent to the state hospital for the limited purpose of determining his capacity to stand trial, defense counsel should challenge on Sixth Amendment grounds the state's attempt to present information garnered during that evaluation at the penalty phase.

In most jurisdictions, courts will allow state expert testimony at least in rebuttal to defense mental health experts. Counsel must then research possible suppression motions and prepare for rigorous cross-examination. Counsel must obtain the client's complete state hospital file, including documents that had been provided by the prosecution. Often a release from the client will suffice. If not, the defense must move for the production of all such material. In most jurisdictions, experts must disclose the underlying facts or data upon which their conclusions rest.[46] Moreover, the prosecution is also constitutionally obligated to disclose anything in the records that is favorable to the defendant or that would provide the basis for undermining any of the criteria for the APD diagnosis.

In many cases, the records will reflect that the state's experts have little or no basis for concluding that the defendant has APD. For instance, state hospital records may contain no information at all about the defendant's life prior to age fifteen, or they may show that the defendant's antisocial acts did not begin until after age fifteen. Thus, there would be nothing on which to base a finding of Conduct Disorder, and hence the defendant cannot have APD. Likewise, the records will show that the state experts did not have evidence of ***repeated*** acts of misconduct. They may have known about one or two arrests for relatively minor crimes or fights, but nothing more.

When it is fairly clear that the criteria for APD do not fit, which will be true in the majority of cases, defense counsel should move to exclude the state's expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*[47] or analogous state law precedent. Counsel can show that the state expert's opinion has no factual support and runs counter to accepted standards and practices in the mental health field.[48] Even if counsel cannot shield the defendant from a court-ordered evaluation and cannot suppress state expert testimony on APD, counsel can at least cross-examine the state's expert about the lack of factual support. Finally, counsel may be able to cross-examine the state's experts about additional information, such as organic brain damage or schizophrenia, that may rule out APD or at least undercut various criteria.

CONCLUSION

At the penalty phase, jurors are already likely to be leaning to sentence the defendant, a person whom they have just convicted of a heinous crime, to death.[49] State expert testimony that the defendant has APD will confirm what the jurors have come to believe about the defendant. To improve the client's chance of receiving a life sentence, defense counsel must either preclude evidence concerning APD or present a compelling case in mitigation that not only helps jurors understand the defendant's history but that also assures them that the defendant is not a future danger, is not remorseless, and is worth saving.

ENDNOTES

1. *See, e.g., Graham v. Collins*, 506 U.S. 461, 500 (1993) (Thomas, J., concurring) (equating antisocial personality disorder with being a "sociopath").
2. *Satterwhite v. Texas*, 486 U.S. 249, 268 (1988) (Blackmun, J., concurring in part and concurring in the judgment).
3. *Id.* at 253.
4. Record on Appeal, *State of South Carolina v. Franklin* at 3182-83.

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5. *See, e.g., Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir. 1997).
6. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559-60 (1998) (jurors more likely to vote for death if they think that the defendant is a future danger and shows no remorse).
7. *Satcher*, 126 F.3d at 572-73.
8. John Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, THE ADVOCATE 4, 10 (AUGUST 1995).
9. 998 S.W.2d 230 (Tex. Crim. App. 1993).
10. *Id*. at 233.
11. 153 F.3d 197 (5th Cir. 1998).
12. *Id*. at 205-06.
13. American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 645 (4th ed. 1994) [hereinafter DSM-IV] at 645.
14. *Id.* at 649-50.
15. John G. Gunderson and Katharine A. Phillips, *Personality Disorders*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1425, 1432 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed. 1995).
16. *Id.* at 1425.
17. *Id.* at 1433.
18. DSM-IV at 648.
19. *Id.* at 85, 646.
20. *Id.* at 90-91.
21. *Id.* at 91.
22. Benedetto Vitiello and Peter S. Jensen, *Disruptive Behavior Disorders*, in 2 COMPREHENSIVE TEXTBOOK ON PSYCHIATRY 2311 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed. 1995); Caroly S. Pataki, *Child or Adolescent Antisocial Behavior*, in 2 COMPREHENSIVE TEXTBOOK ON PSCHIATRY 2477, 2478 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed. 1995).
23. DSM-IV at 91-94.
24. *Id*. at 647.
25. *Id.* at 647; *see also id.* at 631 ("Judgments about personality functioning must take into account the individual's ethnic, cultural, and social background."
26. *Id.* at 86.
27. Vitiello and Jensen, *supra* note 22, at 2315.
28. *Id*.; *see also* Pataki, *supra* note 22, at 2481.
29. Pataki, *supra* note 22, at 2481.
30. DSM-IV at 645-46.
31. *Id.* at 647. DSM-IV and other sources are rich with negative descriptions of the characteristics of those with APD. They are "frequently deceitful and manipulative in order to gain personal profit or pleasure (*e.g*., to obtain money, sex, or power)." *Id.* at 646; *see also Id*. at 647 (those with APD lack empathy and have an inflated self-appraisal and superficial charm). Those with APD are often found to "egocentrically value others for what they can provide, and they believe that, to survive, they need to extort whatever they can." Gunderson and Phillips, *supra* note 15, at 1431.
32. DSM-IV at 649.
33. *Id.* at 632.
34. *Id*.
35. *Id*.
36. *Id.*
37. When both the substance use and antisocial behavior began in childhood, both a substance-related disorder and APD may be diagnosed, even if some antisocial acts were related to the substance-related disorder, *e.g.*, selling drugs or thefts to obtain money to buy drugs. DSM-IV at 648-49.
38. Kenneth S. Pope, James N. Butcher, and Joyce Seelen, THE MMPI, MMPI-2 & MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS 104 (1993).
39. *Id.* at 103.
40. *See* Blume, *supra* note 8, at 5-7.
41. *See, e.g.*, Russell Stetler, *Mental Disabilities and Mitigation*, THE CHAMPION 49 (April 1999); Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION 35 (January/February 1999); Lee Norton, *Capital Cases: Mitigation Investigations*, THE CHAMPION 43 (May 1992).
42. Carl Ginsburg and Helen Demeranville, *Sticks and Stones: The Jailing of Mentally Ill Kids*, THE NATION 17, 18 (December 20, 1999).
43. *Id.* at 645.
44. *See, e.g.*, S.C. Code ' 44-23-410.
45. *Powell v. Texas*, 492 U.S. 680 (1989) (*per curiam*); *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Estelle v. Smith*, 451 U.S. 454, 465 (1981) (trial judge ordered a "psychiatric evaluation for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to [the defendant].").
46. *See, e.g.*, Fed. R. Evid. 705.
47. 509 U.S. 579 (1993); *see also Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).
48. *See generally* Hilary Sheard, *What to do about Daubert?*, THE CHAMPION ___ (forthcoming) (addressing *Daubert* and suggesting methods of using it to attack a variety of state expert evidence, including findings of APD and future dangerousness).
49. *See, e.g.*, Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 12, 14 (1993) (there is a "presumption of death" . . . . A defendant on trial for his life at the punishment phase has one foot in the grave. The defendant needs affirmative action by jurors to pluck him from the crypt, action that is likely to annoy other jurors, at least initially."; Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 Buff. L. Rev. ■

Pretrial Evaluation Program
Kentucky Correctional Psychiatric Center

KCPC Purpose. The Kentucky Correctional Psychiatric Center (KCPC) began operations in September 1981. The purpose of the institution is described in the Mission Statement as follows: "The Kentucky Correctional Psychiatric Center provides state-wide, forensic psychiatric services including pre-trial assessments, treatment for competency restoration, and inpatient care for severely mentally ill persons who are accused or convicted of felony crimes or require a secure environment."

203% Increase in 15 Years. The demands of the pretrial aspect of this mission have grown progressively since its inception. In FY 85/86 there were a total of 352 court orders for competency and/or criminal responsibility evaluations. In FY *00/01* the number of orders had climbed to *1065.* In the past fifteen years, a 203% increase in the number of orders has occurred. The flow chart attached describes the various steps by which a court order is processed.

$281 per day, In-Patient. It would be impossible to perform this volume of evaluations solely on an inpatient basis. In a farsighted decision in 1986, KCPC and the Department for Mental Health and Mental Retardation Services staff developed a program to conduct evaluations on an outpatient basis. The goals of this approach were to keep patients in their local communities, spread the increasing workload over a larger number of evaluators, decrease the waiting list of patients to be admitted to KCP save the expense of a costly inpatient hospitalization ($281.00 per day), and reduce the amount of time required to produce a completed evaluation. An occasional occurrence which may delay the outpatient evaluation process involves patients placed on bond status. These patients sometimes do not keep their appointment for evaluation and requires evaluation to be rescheduled.

$800 for Out-Patient. Currently, the Department for Mental Health and Mental Retardation Services has agreements with eleven community mental health centers to perform these outpatient evaluations. The total amount projected to be spent on outpatient evaluations in FY01-02 is projected to be $405,000. Following is a list of the centers, the individuals performing evaluations, and the counties they serve.

Bluegrass Regional Comprehensive Care Center
Dr. Martin Smith

Anderson	Fayette	Lincoln	Scott	Jessamine
Bourbon	Franklin	Madison	Boyle	Powell
Woodford	Garrard	Mercer	Clark	
Harrison	Nicholas	Estill		

Comprehend, Inc. - Dr. Barbara Jefferson

Bracken	Mason	Lewis	Fleming	Robertson

Cumberland River Comprehensive Care Center
Dr. Vincent Dummer

Bell	Knox	Clay	Laurel
Harlan	Rockcastle	Jackson	Whitley

Life Skills Comprehensive Care Center- Dr. Robert Sivley

Allen	Edmondson	Metcalfe	Warren	Butler
Barren	Hart	Monroe	Logan	Simpson

Four Rivers Comprehensive Care Cente- Dr. Robert Sivley

Daviess	Henderson	Ohio	Union
Hancock	McLean	Webster	

Northern Kentucky Comprehensive Care Center
Dr. James Esmail

Boone	Grant	Campbell	Kenton
Carroll	Pendleton	Gallatin	Owen

Pathways. Inc. - Dr. Walter Powers

Bath	Lawrence	Boyd	Menifee	Montgomery
Carter	Rowan	Greenup	Morgan	Elliott

Pennyroyal Regional Comprehensive Care Center
Dr. Robert Sivley

Ballard	Christian	Lyon	Todd	Hickman
Caldwell	Crittenden	Marshall	Trigg	Hopkins
Muhlenberg				

Four Rivers Regional Comprehensive Care Center
Dr. Robert Sivley

Ballard	Fulton	Livingston	Hickman	Marshall
Calloway	Graves	Carlisle	McCracken	

Seven Counties Services – Dr. J. Robert Noonan

Breckinridge	Jefferson	Oldham	Bullitt	Henry
Larue	Shelby	Grayson	Marion	Nelson
Spencer	Hardin	Meade	Trimble	Washington

Adanta Group - Dr. Horace Stewart

Adair	McCreary	Casey	Pulaski	Green
Clinton	Russell	Taylor	Cumberland	Wayne

Mountain Comprehensive Care Center- Dr. Vincent Dummer

Floyd	Martin	Johnson	Pike	Magoffin

Kentucky River Comprehensive Care Center
Dr. Vincent Dummer

Breathitt	Letcher	Knott	Owlsey
Lee	Perry	Leslie	Wolfe

Training & Referrals: In-service training is offered by KCPC to outpatient evaluators on a regular basis. They also have access at any time to hospital staff to consult on a specific patient or address any issue. Patients evaluated as needing longer term observation and/or treatment may be referred as an inpatient to KCPC by the out-patient evaluator. For example, when the evaluator determines that a patient is not currently competent to stand trial but can benefit from treatment, the patient will be admitted.

50% Out-Patient. The number of cases evaluated on an out-patient basis for FY 00-01 was 528. This is out of a total of 1065 orders for evaluations.

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Increase Expected: This program has proven efficient and effective in addressing the growing volume of court ordered evaluations. It is anticipated that the value of the program will only increase as the demand for such services continues to grow. ■

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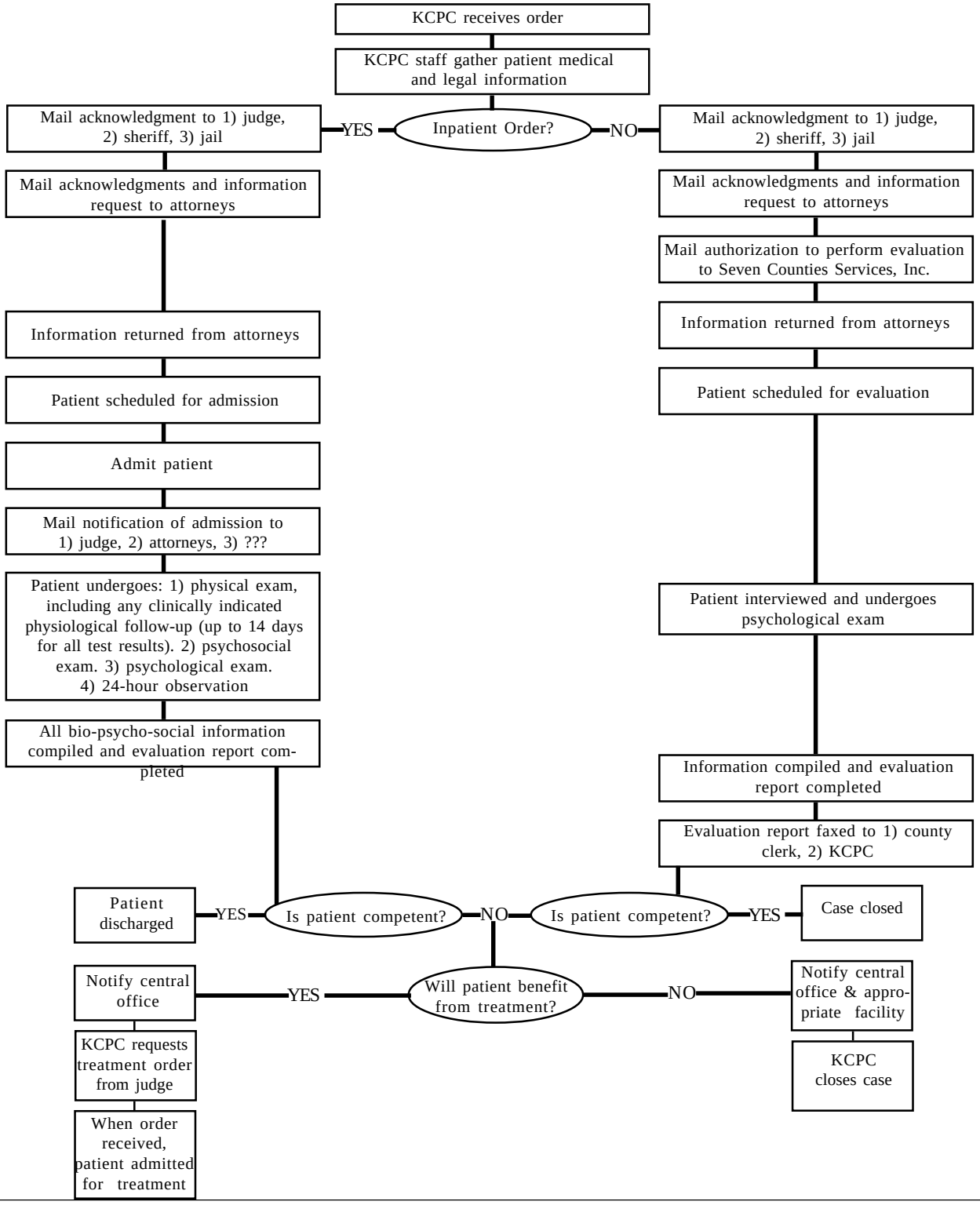
COURT ORDERED EVALUATION PROCESS



PLAIN VIEW . . .

Ernie Lewis, Public Advocate

United States v. Arvizu
122 S.Ct. 744; __ L.Ed.2d __; __ U.S. __ (2002).
Decided Jan. 15, 2002

First, the Court went after soccer moms in *Atwater et al. v. City of Lago Vista et al.*, 121 S.Ct. 1536, 149 L.Ed.2d 549; 532 U.S. 318 (2001). Now, the Court again addresses a situation experienced by many Americans, the minivan out for an outdoors experience.

The case arose in the southeastern part of Arizona. Agent Clinton Stoddard, a border patrol agent, received a report that a sensor had gone off on an unpaved road nearby. From his experience, he believed that indicated that a vehicle was trying to avoid a checkpoint at the intersection of Highway 191 and Rucker Canyon Road. The checkpoint's purpose was both to investigate illegal immigration and smuggling. He headed in the direction of the sensor when a second sensor went off. Stoddard then saw a vehicle coming toward him. When it slowed he saw a man driving, a woman in the passenger seat, and three children in the back with their knees up. "The driver appeared stiff and his posture very rigid," and he appeared not to notice Stoddard, which concerned Stoddard since most people are friendly and wave in remote Arizona. Stoddard began to follow the vehicle. At some point, the children began waving at the officer "in an abnormal pattern…It looked to Stoddard as if the children were being instructed." The vehicle turned at a place where to do so would avoid the nearing checkpoint. Stoddard found the vehicle was registered to someone in Douglas, Arizona, "four blocks north of the border in an area notorious for alien and narcotics smuggling." Stoddard decided to stop the vehicle. He asked Arvizu if he could search the vehicle, and Arvizu agreed. 128.85 pounds of marijuana worth $99,080 were found.

Arvizu was charged with possession with intent to distribute marijuana. The district judge overruled the motion to suppress. However, the Ninth Circuit reversed. It ruled that "fact-specific weighing of circumstances or other multifactor tests introduced 'a troubling degree of uncertainty and unpredictability' into the Fourth Amendment analysis…It therefore 'attempt[ed]…to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops.'" The Court identified 10 factors relied upon by the district court, and found that 7 of the factors "carried little or no weight in the reasonable-suspicion calculus." The remaining 3 factors were not sufficient to constitute reasonable suspicion.

The United States Supreme Court granted *certiorari* and reversed in a unanimous opinion written by the Chief Justice. The Court reaffirmed that the reasonable suspicion test of *Terry v. Ohio*, 88 S.Ct. 1868; 20 L.Ed. 2d 889; 392 U.S. 1 (1968) involved an analysis of the totality of the circumstances. Significantly, the Court delineated the low standard involved in the reasonable suspicion calculus. "Although an officer's reliance on a mere '"hunch"' is insufficient to justify a stop, *Terry*, *supra*, at 27, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard."

The Court also rejected the methodology of the Ninth Circuit, which had rejected 7 of the 10 factors relied upon by the district court as being as consistent with innocence as guilt. "Respondent argues that we must rule in his favor because the facts suggested a family in a minivan on a holiday outing. A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct…Undoubtedly, each of these factors alone is susceptible to innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment."

United States v. Knights
122 S.Ct. 587; __ L.Ed. __; __ U.S. __ (2001)

The United States Supreme Court has answered a question left open in *Griffin v. Wisconsin*, 107 S.Ct. 3164; 97 L.Ed.2d 709; 483 U.S. 868 (1987). In that case the Court held that a "search of a probationer conducted pursuant to a Wisconsin regulation permitting 'any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are "reasonable grounds" to believe the presence of contraband' was constitutional. Left unanswered was whether a probationary search conducted for investigatory purposes rather than purposes related to probation would likewise pass constitutional muster. In this unanimous opinion written by Justice Rehnquist, the Court answered in the affirmative.

Knights had been under suspicion for acts of vandalism related to PG&E for some time when he was placed on probation for a drug offense in California. As part of his probation, Knight agreed to submit his "'person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.'" Three days after he agreed to these terms, PG&E suffered a fire causing $1.5 million in damage. A sheriff's deputy drove by Knight's residence and saw the truck of a person known

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to be an associate. The deputy felt the truck and found it to be warm. The deputy set up surveillance, and eventually the associate came out of the residence carrying what the deputy believed to be pipe bombs and walked to a nearby river and threw the items into the river. The deputy then looked in the truck and saw a Molotov cocktail, explosives, and a gas can. The deputy decided to search Knight's residence, knowing that there was a probation condition allowing him to search without a warrant. The deputy went into the residence without a warrant and found evidence of his participation in the arson. Knights was arrested and charged with conspiracy to commit arson, possession of an unregistered destructive device, and being a felon in possession of ammunition. The federal district judge granted Knights' motion to suppress, finding that the search was for investigatory purposes rather than probationary purposes. The 9th Circuit affirmed. *U.S. v. Knights*, 219 F.3d 1138 C.A.9 (Cal.), 2000.

The United States Supreme Court disagreed, and reversed the 9th Circuit. The Court held that the Fourth Amendment does not limit probationary searches to those with a probationary purpose. The Court by doing so went beyond the "special needs" search of *Griffin*. Rather, the Court clearly held that "the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances.'" Thus, a probationary search may be constitutional where it is viewed as "reasonable," rather than being a special need of a probationary scheme.

By using the reasonableness approach, the Court visited the balancing test of the past, whereby it assessed "'on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Wyoming v. Houghton*, 119 S.Ct.1297; 143 L.Ed.2d 408; 526 U.S. 295 (1999). The Court found that while the probationary condition reduced Knights' privacy rights, "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.'" The Court also found that because probationers commit crimes at a higher rate than the general population, that the state has an interest in probation searches. "We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." Further, the Court also held that the same balancing caused them to hold that the warrant requirement was not necessary under these circumstances.

This is a very short, but very significant opinion. Millions of Americans are on probation or parole at any given time. This search allowed for a warrantless entry into Knights' home based upon less than probable cause. Presumably no knock and announce was required. No judicial review occurred prior to the entry into Knights' house. Presumably the deputy could have found evidence related to someone other than Knights who was sharing the house with him. The possibility for abuse is immense.

Buchanon v. Commonwealth
2001 WL 1555654
(Non Final)
Dec. 7, 2001

The Court of Appeals has issued an important opinion regarding roadblocks. Here, the Butler County Sheriff's Department set up a "drug/DUI" roadblock at the intersection of Kentucky highways 70 and 1117/369. Buchanon was stopped and asked for his license and registration. The stopping officer later testified that Buchanon smelled "strongly of cologne," that he was nervous and had blood-shot eyes. However, he passed two field sobriety tests. Failing to discover evidence of intoxicated driving, the deputy then asked Buchanon for consent to search his car. Buchanon refused. A drug detection dog was called, and it alerted on the passenger door. A search revealed marijuana, methamphetamine, and drug paraphernalia. Buchanon was arrested and charged with possession of a methamphetamine, controlled substance, DUI, possession of marijuana, and possession of drug paraphernalia. After his motion to suppress was denied, he entered a conditional plea of guilty.

The Court of Appeals reversed in a decision written by Judge Huddleston, and joined by Judgs Guidugli and Johnson. Key to the decision was *City of Indianapolis v. Edmond*, 121 S.Ct. 447; 148 L.Ed.2d 333; 531 U.S. 32 (2000) and *United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998). *Edmond* had recently condemned roadblock searches whose purpose was to detect criminal behavior rather than regulate conduct on the highway. The Court analogized what occurred in *Huguenin* and applied it to the facts of this case. "[T]he Huguenin court found that although the detection of drug trafficking is an important governmental interest, it does not warrant pretextual roadblock stops when there is no probable cause or individualized suspicion to otherwise stop the vehicle in question because the severity of interference with individual liberty necessarily created by this type of roadblock is too great to make the intrusion reasonable under the Fourth Amendment to the Constitution of the United States."

United States v. Graham
275 F.3d 490
C.A.6 (Mich.),2001.
Decided Dec. 17, 2001

The Sixth Circuit reviewed two searches in this opinion which was written by Judge Moore and joined by Judge Boggs. First, the Court reviewed Graham's challenge to the search of his trailer pursuant to a warrant. Graham had apparently been both growing a significant amount of marijuana, stealing marijuana from other grower's patches, and engaging in militia activity in Michigan. As a result, he came under the scrutiny of both state and federal police. Eventually, a 40-

page affidavit was presented to a federal magistrate, a search and arrest warrant were issued, and Graham's trailer was searched, revealing drugs and many weapons. Graham was charged with multiple conspiracy and drug offenses. Graham's motion to suppress was denied, and eventually he was found guilty at a jury trial.

Graham first asserted on appeal that there was insufficient evidence in the affidavit for the magistrate to find probable cause that evidence of criminality would be found in his trailer. The Court reviewed the issue under *Illinois v. Gates*, 103 S.Ct. 2317; 76 L.Ed.2d 527; 462 U.S. 213 (1983), and found that under the totality of the circumstances, probable cause had been presented to the magistrate. "A practical, commonsense reading of this affidavit based on the totality of the circumstances, including the veracity and bases of knowledge of the people supplying information, clearly compels the conclusion that there was a fair probability that illegal weapons or other evidence of a crime would be found at Graham's home."

Graham also challenged the search based upon an allegation that there had been both significant omissions and misstatements in the affidavit. The Court summarized the requirements of *Franks v. Delaware*, 98 S.Ct. 2674; 57 L.Ed.2d 667; 438 U.S. 154 (1978), saying that a "defendant is entitled to a hearing to challenge the validity of a search warrant if he 'makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and the allegedly false statement is necessary to the finding of probable cause…If, at the evidentiary hearing, 'the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search' suppressed." Applying this standard, the Court rejected Graham's *Franks* claim. "We believe that even if Graham could make a substantial showing that Agent Semear recklessly or deliberately made false statements—which he cannot because paragraphs 42 and 43 were, in fact, truthful—Graham cannot meet the second prong of the *Franks* test because the affidavit contains sufficient probable cause even when the allegedly false statements are set aside."

Graham also challenged the warrantless search of his truck, conducted over his objection after the search of his trailer pursuant to the search warrant. The Court found that the agent had probable cause to believe that the truck contained evidence of a crime, that no exigent circumstances need be found, and thus the search was legal. The Court relied on *Pennsylvania v. Labron*, 116 S.Ct. 2485; 135 L.Ed.2d 1031; 518 U.S. 989 (1996).

United States v. Talley
275 F.3d 560
C.A. 6 (Tenn.) 2001
Decided Dec. 28, 2001

On August 23, 1999, federal agents in Memphis executed an arrest warrant on Vidale Cothran at his home. After knocking, the agents heard a lot of commotion, causing them to turn off the electricity in the apartment and to put on bulletproof vests. Once Cothran opened the door, a series of confusing events occurred, with people appearing and questions being asked. Eventually, the police asked, "where's the gun?" Talley answered, a gun, and later cocaine, were discovered. Talley's motion to suppress his statement, and evidence seized thereafter, was sustained by the federal district judge. The United States appealed.

In a unanimous opinion written by Judge Kennedy, joined by Judges Keith and Batchelder, the Sixth Circuit reversed the lower court. Talley asserted that the officers' had entered the apartment illegally, and that the *Quarles* exception to *Miranda* did not apply. The Court found that Talley had no standing to challenge the officers' entry into Cothran's apartment. "[A]lthough an overnight guest may be able to establish a legitimate expectation of privacy in the home of his host, *see Minnesota v. Olson*, 110 S.Ct. 1684; 109 L.Ed.2d 85; 495 U.S. 91 (1990), persons who are in another's home solely for business purposes—as opposed to being on the premises for a personal occasion—do not have such an expectation of privacy. *Minnesota v. Carter*, 119 S.Ct. 469; 142 L.Ed.2d 373; 525 U.S. 83 (1998). Talley, like the defendants in *Carter*, presented no evidence that he had been in the apartment for any period of time or for any purpose that would give rise to his having a legitimate expectation of privacy in that apartment. Therefore, Talley lacks standing to bring a Fourth Amendment challenge to the legality of Officer Rush's entry into the apartment. Because Talley had no expectation of privacy in the house, he cannot challenge the events preceding the officer spotting the magazine and ammunition inside the trash can. Therefore, his *Miranda*-less questioning is controlled by *New York v. Quarles*, 104 S.Ct. 2626; 81 L.Ed.2d 550; 467 U.S. 649 (1984)."

United States v. Matthews
2002 WL 23908
C.A. 6 (Tenn.) 2002
Decided Jan. 10, 2002.

Matthews was walking on a street in a public housing project in Nashville, Tennessee. He saw Officer Elston who "focused his attention on the defendant because the defendant appeared to be watching the police cruiser closely." The officer yelled for Matthews to "come here." Instead, Matthews began to walk quickly away. Elston pursued, Matthews ran into an apartment, knocking the owner of the apartment down in the process. A gun was found under furniture in the apartment. Matthews entered a conditional guilty plea after his suppression motion was denied.
The Sixth Circuit affirmed the denial of the motion to suppress. Judge Kennedy was joined by Judges Keith and Batchelder. The Court held that once Matthews began to run, reasonable suspicion was present. The Court rejected

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the notion that because the officer provoked the flight, that justified his latter criminal activity of trespass. The Court also ruled that there was no stop when the officer initially yelled for Matthews to come to the car, saying that "seizure begins after a suspect is tackled…," citing *California v. Hodari D.*, 111 S.Ct. 1547; 113 L.Ed.2d 690; 499 U.S. 621 (1991).

SHORT VIEW . . .

1. *Baker v. State*, 556 S.E.2d 892 (Ga. Ct. App. 12/3/01). The Georgia Court of Appeals has weighed in on the issue of the roadblock, finding here that the state must prove that the primary purpose of the roadblock was one of highway regulation rather than crime control, and that the proof must come in the form of a supervisor rather than the officer conducting the roadblock. The Court stated that *Indianapolis, Ind. v. Edmond*, 121 S.Ct. 447; 148 L.Ed.2d 333; 531 U.S. 32 (2000) had "elevated proof of the supervisor's 'primary purpose' to a constitutional prerequisite of a lawful checkpoint."

2. "Will you 'waive' more than your hand when hailing a cab?: an affirmative rethinking of vehicle passengers' rights," 35 Val. U.L. Rev. 309 (2000) is an interesting law review article exploring the privacy rights of taxicab passengers. The article focuses on whether a taxicab passenger may be required to get out of the vehicle when the police have probable cause to pull over the driver, and the extent to which the police may search personal property of the passenger. The article calls for the following rule: "when conducting a warrantless taxicab search, police officers who search a taxicab passenger must either (1) possess individualized probable cause to search that passenger or (2) the taxicab passenger must be subject to a lawful full custody arrest. In addition, officers must inquire into the ownership of each item they wish to search to determine whether it belongs to the taxicab driver or passenger."

3. *State v. Tye*, 636 N.W.2d 473 (Wis. 11/27/01). The Wisconsin Supreme Court has thrown out evidence seized pursuant to a warrant where the investigator failed to swear or affirm to the truth of the affidavit. This occurred despite the fact that the investigator brought his failure to swear to the truth of the affidavit to the attention of the prosecutor, followed by the preparation of another affidavit. The Court also ruled that the good faith exception did not apply to these circumstances. The history of the Fourth Amendment "demonstrates the critical importance that the drafters of the federal and state constitutions have placed on the oath to support a search warrant."

4. *McGaughey v. State*, 37 P.3d 130 (Okla. Crim. App. 11/9/01). Where an officer pulls a vehicle over for a traffic violation, but later realizes that he is in error regarding the violation, he must stop the detention. Here, the officer realized that the taillights on McGaughey's truck were in fact working properly. Instead of letting him go, the officer continued the detention, asking for his driver's license, and shining his flashlight through the vehicle, spotting a gun. Consent was obtained, and ultimately drugs were found. The Court held that the stop should have ended at the beginning when the officer discovered that his traffic stop was in error. "A detention that continues beyond the point at which an officer determines that his initial rationale for the stop was mistaken can no longer be considered 'reasonably related in scope' to the initial justification for that intrusion."

5. *People v. Anthony*, 2001 WL 1552631 (Ill. 12/6/01). A person being talked with by the police does not give consent to search by merely "assuming the frisk position." The police had approached the defendant when he walked away from them near an apartment building. He kept his hands out of his pockets as requested, and answered questions asked of him. When asked whether he was carrying anything illegal, he said no. The officer then asked to search his person, and instead of answering, he raised his hands up on his head and spread his legs apart. A rock of cocaine was discovered. The Illinois Supreme Court held that this was mere acquiescence to a show of authority rather than consent and in the absence of probable cause or reasonable suspicion resulted in an illegal search and seizure.

6. *State v. Bauer*, 36 P.3d 892 (Mont. 12/6/01). The Montana Supreme Court has ruled that as a matter of state constitutional law, the police may not arrest someone for a non-jailable offense, thus mandating suppression of cocaine found incident to the arrest here for minor in possession of alcohol. This was contrary to the decision of the US Supreme Court interpreting Fourth Amendment law in *Atwater v. Lago Vista, Tex.*, 121 S.Ct. 1536; 149 L.Ed.2d 549; 532 U.S. 318 (2001). "We hold that under Article II, Section 10 and Section 11, of the Montana Constitution, it is unreasonable for a police officer to effect an arrest and detention for a non-jailable offense when there are no circumstances to justify an immediate arrest…In the absence of special circumstance such as a concern for the safety of the offender or the public, a person stopped for a non-jailable offense such as second offense MIP, or a seatbelt infraction should not be subjected to the indignity of an arrest and police station detention when a simple, non-intrusive notice to appear…will serve the interests of law enforcement." ■

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Justices To Hear Death Row Case Involving Race Claim

Attorneys allege racism in Dallas County jury selection in 1986 *Dallas Morning News*, 2/16/02 by ED TIMMS and JENNIFER EMILY. Staff writer Diane Jennings contributed to this report.

The nation's highest court agreed to review the case of Texas death row inmate Thomas Miller-El on Friday a week before he was to be executed and nearly 16 years after his trial attorneys alleged that potential jurors were excluded from his trial because of their race. Mr. Miller-El was convicted in 1986 of the murder of Irving hotel clerk Douglas Walker, who was shot in the back after being bound and gagged during a robbery. Another clerk, Donald Ray Hall, was shot and permanently paralyzed from the chest down. He later identified Mr. Miller-El as his assailant.

A petition on Mr. Miller-El's behalf submitted to the U.S. Supreme Court last year alleged that Dallas County prosecutors used peremptory challenges legal objections that allow lawyers to dismiss prospective jurors without explanation to eliminate 10 of 11 qualified blacks. Mr. Miller-El, who is black, was convicted and sentenced to death one month before the Supreme Court handed down a landmark decision, *Batson vs. Kentucky*, which sought to eliminate the practice of discrimination in jury selection. An earlier ruling, *Swain vs. Alabama*, called upon defense attorneys to document a pattern of exclusion, which was described in *Batson* as a "crippling burden of proof."

Legal experts said Friday that if the Supreme Court focuses on the issue of racial discrimination in the Miller-El case, it could further refine jury-selection practices and affect other death penalty cases. "What makes it significant is that a form of racial selection is still practiced in criminal trials in general, and in death penalty trials in particular," said University of Houston law professor David Dow. "The Miller-El case is a particularly egregious example of that." Because the Supreme Court took the case, he said, "at least suggests that the court is seriously concerned about the allegations that racial criteria are used in jury selection in capital cases."....Mr. Marcus claims that prosecutors did in fact keep blacks off Mr. Miller-El's jury because of their race.

The petition he submitted to the Supreme Court late last year cited statistics from a 1986 series by *The Dallas Morning News* on discrimination in jury selection. The statistics showed that in 100 randomly selected felony trials, 86 percent of blacks eligible for jury duty were eliminated by prosecutors' peremptory challenges. *The News* also examined the 15 capital murder cases tried in Dallas County between 1980 and December 1986; prosecutors used peremptory challenges to remove nine out of 10 qualified blacks. One black was seated on Mr. Miller-El's jury, a man who said he thought Texas' death penalty was "too quick" and suggested that staking defendants on ant beds and pouring honey on them was a more appropriate punishment. A Hispanic juror and another
of Filipino ancestry also reportedly served on his jury. Mr. Marcus noted in the petition that juror information cards filled out by prospective jurors in Mr. Miller-El's trial did not provide a blank for their race but that the "race and gender of every juror is coded on each card, in the prosecutors' handwriting."

A brief filed by state attorneys noted that objections over the jury's selection were raised by Mr. Miller-El's trial attorneys in 1986, and the judge conducted a hearing to consider their concerns. "At the conclusion of the hearing, the trial judge found that there was no evidence presented that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office," they wrote. Documents in Mr. Miller-El's case also described a 1969 memorandum written by a senior Dallas County prosecutor, which advised: "You are not looking for any member of a minority group which may subject him to oppression they almost always empathize with the accused." The memo was used to train prosecutors. A 1963 treatise by another prosecutor recommended against permitting "Jews, Negroes, Dagos and Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."

The Miller-El petition before the Supreme Court alleges that the "essential content of this advice remained in the training materials of Dallas County prosecutors at least until 1980. In an interview on Wednesday, Mr. Miller-El said he has no doubt that a different racial makeup of the jury would have changed the outcome of his sentence. "My trial was set up as a hate situation." he said. "The system was in denial."■

6th Circuit Review

Emily Holt

U.S. v. Gonzales-Vela
2001 WL 1504553 (6th Cir. unpublished opinion 11/21/01; released for full-text publication 1/7/02)

Sexual Abuse Misdemeanor Offense Treated as "Aggravated Felony" in Federal Immigration Cases

This is a case that Kentucky criminal law practitioners must know, especially those attorneys who work with clients who may be subject to deportation! Gonzales-Vela was sentenced to 21 months imprisonment after pleading guilty to illegally re-entering the United States. The government, on appeal, argued that the district court should have added 16 levels to Gonzales-Vela's base offense level because his prior conviction of second-degree sexual abuse, a misdemeanor under Kentucky state law, should be treated as an "aggravated felony" under the federal sentencing guidelines. The 6th Circuit agrees and remands the case to district court for re-sentencing.

In 1997, in Kentucky state court, Gonzales-Vela was indicted for first-degree sexual abuse for allegedly touching a 5-year-old and a 7-year-old in their vaginal areas. He pled guilty to an amended charge of second-degree sexual abuse, which, as a misdemeanor, was punishable by a sentence no longer than 12 months imprisonment. His sentence was 60 days that he had already served.

Under the federal sentencing guidelines, an "aggravated felony" includes "murder, rape, or sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A). It is clear from the facts of his case that Gonzales-Vela did plead guilty to sexual abuse of a minor. The 6th Circuit rejects the argument that a state misdemeanor conviction cannot be turned into an "aggravated felony" for purposes of § 1101(a)(43): "There is no explicit provision in the statute directing that the term 'aggravated felony' is limited only to felony crimes...We therefore are constrained to conclude that Congress, since it did not specifically articulate that aggravated felonies cannot be misdemeanors, intended to have the term aggravated felony apply to the broad range of crimes listed in the statute, even if these include misdemeanors." *quoting Guerrero-Perez v. INS*, 242 F.3d 727, 736-737 (7th Cir. 2001).

Attorneys Must Advise Clients Who May Be Subject to Deportation

The Court does note that this holding is limited to the arena of immigration law: "as long as a defendant's former conviction leading to deportation can legitimately be termed 'sexual abuse of a minor,' that act must be considered an 'aggravated felony' *for immigration law purpose*, regardless of a state designation as either a felony or a misdemeanor." (emphasis in original) Attorneys should consider this ruling when advising clients of the advisability of a plea involving sexual abuse charges.

Judge Merritt Dissent

Judge Merritt dissents, incorporating into his Opinion Judge Straub's Dissent in *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), and also noting that the rule of lenity should apply.

U.S. v. King and Ramirez-Mendoza
272 F.3d 366 (6th Cir. 11/27/01)

Use of Transcripts of Audio-Tapes at Trial Within Trial Court Discretion

King and Ramirez-Mendoza were convicted of various drug conspiracy offenses. While the majority of the 6th Circuit's decision is of little use to the state court attorney, the portion of the opinion dealing with the use of transcripts of tape-recorded conversations at trial is of interest.

A government informant, Tami Butterfas, made recorded phone calls to King, his wife Valerie, and Ramirez-Mendoza. With Mr. and Mrs. King, she discussed how they should work together in telling their stories to authorities. With Ramirez-Mendoza, she talked about a prospective drug deal. During trial the government read from the transcript of one of the tapes. The trial court did give a limiting instruction that the transcript was not evidence and the tape controlled.

6th Circuit Guidelines for Use of Transcripts: Judge to Personally Check Accuracy

The Court of Appeals notes that trial courts have considerable discretion in allowing the use of transcripts of tapes during trial. King points to *U.S. v. Robinson*, 707 F.2d 872 (6th Cir. 1983), where the 6th Circuit found an abuse of discretion in the use of a transcript where the tapes were for the most part unintelligible and the transcript was prepared with the aid of the recollections of agents who monitored the conversation as it was recorded. The Court reversed and laid guidelines for the use of transcripts at trial: "In the absence of a stipulation, we hold that the transcriber should verify that he or she had listened to the tape and accurately transcribed its content. The court should also make an independent determination of accuracy by reading the transcript against the tape. Where, as here, there are inaudible portions of the tape,

the court should direct the deletion of the unreliable portion of the transcript. This, however, assumes that the court has predetermined that unintelligible portions of the tape do not render the whole recording untrustworthy." *Id.*, 878-879.

In the case at bar, the Court notes that there is no allegation that inaudible portions of a transcript render the entire transcript untrustworthy. Further, Butterfas testified to the accuracy of the transcripts; the court gave a cautionary instruction; and the transcript did not go back into the jury room. No error occurred.

Israfil v. Russell
2001 WL 1687558 (6th Cir. unpublished opinion 8/21/01; released for full-text publication 12/21/01)

"Properly Filed" When Delivery and Acceptance Comply with State Filing Rules

Israfil filed 3 state post-conviction motions. The first two motions were properly filed collateral attacks on the judgment. The issue for the Court is whether his third motion, filed July 27, 1998, was properly filed and thus tolled the AEDPA 1-year statute of limitations. Israfil's state court convictions became final before the effective date of the AEDPA so he had until April 24, 1997, to file his habeas corpus petition. His petition was filed May 24, 2000, almost three years late. If the third state court motion was properly filed, his habeas corpus petition is timely filed.

The 6th Circuit decides that the July 27, 1998, motion was not properly filed within the meaning of § 2244(d)(2). A petition is "'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings, *e.g.*, requirements concerning the form of the document, the court and office in which it must be lodged, payment of a filing fee, and applicable time limits upon its delivery." In the case at bar, the Ohio state courts determined that the petition was filed 2 years outside of the time limitation. "Principles of comity require federal courts to defer to a state's judgement on issues of state law and, more particularly, on issues of state procedural law. . . Because states courts are the final authority on state law, federal courts must accept a state court's interpretation of its statutes and its rules of practice." (citations omitted)

Fields v. Bagley
275 F.3d 478 (6th Cir. 12/19/01)

Ineffective Assistance of Counsel on Interlocutory Appeal

In this case, the 6th Circuit affirms the district court's granting of a writ of habeas corpus because Field's due process rights and right to counsel were violated when his attorney failed to notify him that the state had successfully appealed a suppression motion as well as even represent him in that proceeding. The Court simply adopts the district court's opinion in this case.

Mr. Fields was charged with 2 counts of aggravated trafficking and one count of possession of criminal's tools after cocaine was found in search of his luggage at the Cleveland airport. Fields retained counsel, Donald Tittle, who moved to suppress the cocaine. The trial court suppressed the cocaine after finding it was the fruit of an unreasonable search and seizure. Fields was released from custody and returned home to Seattle, Washington.

The state appealed the trial court's suppression ruling. The state served Mr. Tittle, but not Mr. Fields. Tittle made no effort to notify Fields and felt that he was no longer Fields' attorney. Tittle does say in an affidavit that he notified the appeals court and the prosecutor that he was no longer Fields' attorney. Regardless, Tittle never filed a motion to withdraw. The appeals court reversed the trial court without either Tittle or the state briefing the issue. The opinion appeared with Tittle's name as counsel and Tittle successfully moved to have his name removed from the opinion.

The Cuyahoga County public defender filed a motion for reconsideration of the decision because Fields was not represented by counsel. The Court of Appeals denied the motion as did the Ohio Supreme Court two times. The case was eventually remanded to the trial court where Fields entered a plea of nolo contendere to all of the counts. Fields proceeded directly to federal court, abandoning his state direct appeal of his convictions and sentence.

Exhaustion Where Interlocutory Appeal Taken to Highest State Court - Direct Appeal of Conviction and Sentence Not Required

On federal habeas review, Fields claims that he was denied effective assistance of counsel on the state's interlocutory appeal of the trial court's suppression order. The state first claims that Mr. Fields has failed to exhaust this claim. The Court disagrees noting that Fields twice petitioned the Ohio Supreme Court to reopen the case because of lack of counsel on the interlocutory appeal. "Fields has taken his claim to the highest court in Ohio, and that court had the ability to review the claim on its merits. This is all that is necessary to exhaust his claim." There is no requirement that he pursue a direct appeal before proceeding to federal court where the claim is only about the interlocutory appeal issue.

No Assistance of Counsel Where Client Not Advised of Appeal by State

As to the merits of the ineffective assistance of appellate counsel claim, the Court finds that *Strickland* has been met because of the complete absence of counsel on the interlocutory appeal. *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right, *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), and an interlocutory appeal is no different. *U.S. Ex. Rel. Thomas v. O'Leary*, 856 F.2d 1011 (7th Cir. 1988).

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Tittle "did not provide any assistance at all, let alone effective assistance." He failed to tell Fields and the court that he was no longer acting as legal counsel and he failed to inform Fields that the state had appealed. The "cause" prong of *Strickland* is satisfied. Fields had also met the "prejudice" prong: "Fields was not able to present any argument to advocate for affirmation of the suppression order, which, by itself, is enough to show prejudice." The Court specifically notes a showing of prejudice because of the fact that the State had failed to include a significant portion of the suppression hearing transcript in the record that would have helped Fields' case. Because of the lack of counsel, Fields had no way of pointing out to the appellate court the intentional absence of an integral part of the appellate record.

"Invited Error" Doctrine Inapplicable

Finally, the Court rejects the state's argument that Fields' "invited error" and cannot now profit from it. "The doctrine of 'invited error' is a branch of the doctrine of waiver in which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside." The Court notes that there is no evidence of invited error in this case and the insinuations that the Cuyahoga County public defender and Tittle plotted to leave Fields without counsel so he would have an issue for appeal "borders on the absurd."

U.S. v. Williams
274 F.3d 1079 (6th Cir. 12/20/01)

Improper Venue: "Substantial Contacts" Test

While this case may not be of much use for those who exclusively practice state criminal law, it is interesting nonetheless because the 6th Circuit reverses Williams' conviction for improper venue. A government informant, Carboni, contacted Williams to arrange to purchase marijuana. Carboni had numerous conversations with Williams and Williams' co-defendant Del Bosque in Houston, Texas. Carboni told the men that he planned to sell the marijuana in Michigan.

Despite the fact that no activity occurred in Michigan, Williams was indicted in the Eastern District of Michigan for conspiracy to possess with intent to distribute marijuana. He was subsequently convicted.

Both the U.S. Constitution and the Federal Rules of Criminal Procedure require that a criminal prosecution should occur where the crime was committed. The 6th Circuit uses the "substantial contacts" test to determine venue. This test "takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate fact finding." *U.S. v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986) The government argues that venue is proper in Michigan because that is where the drugs were to be sold and thus were the effect of the conspiracy would be felt.

The 6th Circuit rejects this argument, noting that it is only the "declared intention" of the government informant that established that the drugs would be sold in Michigan. A government agent cannot be a conspirator, *U.S. v. Pennell*, 737 F.2d 521, 536 (6th Cir. 1984); also, Carboni obviously had no plans to actually sell the marijuana in Michigan. Furthermore, no activity by any defendant occurred in Michigan. The agreement occurred in Texas. All of Williams' witnesses would be found in Texas. Michigan was chosen solely for the convenience of the government.

U.S. v. Talley
275 F.3d 560 (6th Cir. 12/28/01)

The district court suppressed Talley's statement obtained before he was given *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436 (1966). The 6th Circuit reverses.

Police officers sought to execute a federal arrest warrant on Vidale Cothran at his apartment. The officers knocked on the door and saw someone look out a window. An officer identified himself to that person. Loud commotion could be heard from the apartment. The officers put on bulletproof vests. The officers knocked on the door again and then turned the electricity off to the apartment. Mr. Cothran then opened the door and obeyed the request to lay on the floor. Officers secured other individuals, including the defendant Mr. Talley. Officer Rush spied 2 shadowy figures in the rear of the apartment and went inside, bumping into a trashcan that contained bullets and a magazine for a semiautomatic. He asked the individuals, "Where's the gun?" and Mr. Talley answered that it was in the vacuum cleaner. A sweep of the house revealed drugs and drug paraphernalia.

No *Miranda* Warnings Required Where *Quarles* Public Safety Exception Applies

Talley sought to exclude the statement about the location of the gun. No *Miranda* warning had been given. The district court excluded the statement, noting that while the statement was voluntarily it violated the ban on interrogation without *Miranda* warnings. The district court further found that officers violated the 4th amendment by entering the apartment without justification so the *New York v. Quarles*, 467 U.S. 649 (1984), public safety exception was inapplicable. The magazine, bullets, and gun were suppressed.

The 6th Circuit first holds that Talley, a guest on the Cothran home, had no reasonable expectation of privacy in the apartment. As a result he lacks standing to bring a 4th amendment challenge to the legality of the officers' entry into the apartment. His questioning is controlled by *Quarles* that allows interrogation "when officers have a reasonable belief based on articuable facts that they are in danger. The question of whether a belief is reasonable is one we review *de novo*,

since the reasonableness test is objective, not subjective." *Quarles*, 467 U.S. at 656.

The Court holds that the officers had a legal justification in entering the apartment and as a result, Rush saw the magazine and ammunition. The officers then had a reasonable belief that others who might pose a danger were in the area so a protective sweep was justified. The Court notes that the reasonable belief of danger is evidenced by the donning of bullet proof vests after the officers heard a lot of noise inside the apartment.

Furthermore, Officer Rush saw 2 shadowy figures in the home that required him to enter the apartment. He then saw the bullets and magazine and was justified, under *Quarles*, in asking where the gun was prior to *Miranda* warnings.

Quarles Still Good Law Despite *Dickerson*

The 6th Circuit refuses to overrule *Quarles* because of the Supreme Court decision in *Dickerson v. U.S.*, 120 S.Ct. 2326 (2000), where the Court held that the right to *Miranda* warnings was constitutionally based and not prophylactic. The Court of Appeals notes that the *Dickerson* majority expressly incorporated *Quarles* into the "constitutional" right to *Miranda* warnings.

Palmer v. Carlton
2002 WL 10195 (6th Cir. 1/4/02)

In 1997 Palmer was convicted in Tennessee state court of aggravated rape. His first petition for state post-conviction relief was filed in 1990. After losing the first petition, he filed a second petition for state post-conviction relief in 1995. On December 8, 1997, the dismissal of that petition was affirmed by the Tennessee Supreme Court. On December 8, 1998, Palmer's federal habeas petition was filed. On March 2, 1999, the federal district court granted Palmer's motion for voluntary dismissal, without prejudice, to permit the exhaustion of state remedies. On May 24, 1999, the petition was refiled, but it was dismissed 2 weeks later, with prejudice, because it was untimely.

Determination of Whether "Properly Filed" Has Nothing to do with Claims Presented

The district court's dismissal was based on the grounds that AEDPA's one-year statute of limitations was not tolled by the second state post-conviction petition because that petition was not "properly filed" under the AEDPA. Specifically, the petition was not "properly filed" because it was barred as the underlying claims had been previously determined or waived when not raised in the first post-conviction petition. This interpretation of the AEDPA is no longer correct. The U.S. Supreme Court in *Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000), held that a petition is "'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. . . But in common usage, the question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar." (emphasis in original) Thus, the 6th Circuit holds that the district court erred when it held that Palmer's petition was not properly filed because of the claims in the petition.

Petition Still Untimely Where Statute of Limitations Had Run When Petition Dismissed Without Prejudice For Petitioner to Exhaust Claims

However, that is not the end of the inquiry for the Court of Appeals. Palmer's habeas petition is still invalid. Palmer had until December 8, 1998, to file his habeas petition. He did so exactly on December 8th. The petition was initially timely. On March 2, 1999, the district court dismissed the petition, without prejudice, to allow exhaustion of a claim in state court. When Palmer refiled on May 24, 1999, the petition was untimely. "Palmer could not validly refile his habeas petition because the limitations period under AEDPA had run on the date of his initial filing." *Duncan v. Walker*, 121 S.Ct. 2120 (2001).

Petition Must Include Federal Claims to Toll Statute of Limitations

The Court rejects Palmer's argument that a "petition for declaratory order" filed in state court in August 1997, and not finally dismissed until March 22, 1999, should be considered a post-conviction petition tolling the limitations period because this pleading did not present a federal claim for review. *Austin v. Mitchell*, 200 F.3d 391, 394 (6th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000).

Stay in Proceedings May Be Appropriate in Some Cases

The 6th Circuit affirms the dismissal of Palmer's federal habeas petition, albeit on different grounds. The Court does not foreclose the possibility that in similar cases where a timely filed petition is dismissed without prejudice so claims can be exhausted a district court may be justified in retaining jurisdiction over the meritorious claims and staying further proceedings pending complete exhaustion of state remedies. Specifically the district court would stay proceedings for a reasonable period of time, perhaps 30 days before exhaustion and 30 days after exhaustion. This approach was suggested by Justice Stevens, in a concurring opinion joined by Justice Souter, in *Duncan*, *supra*, and adopted by the 2nd Circuit in *Zarvela v. Artuz*, 254 F.3d 374 (2nd Cir. 2001). The 6th Circuit refuses to apply this approach in Palmer's case because his state court remedies were exhausted on March 22, 1999, but he did not refile in federal court until May 24, 1999, and 2 months is not a reasonable period of time.

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Ford v. Curtis
2002 WL 23949 (6th Cir. 1/10/02)

In 1991 Ford was convicted in Michigan state court of felony murder, armed robbery, and felony firearm. He was sentenced to life without parole. These convictions arose from the 1983 robbery and murder of a security guard at a Montgomery Ward's in Detroit. Two men committed the crimes. David Temple, one of the men, was killed during the incident. While suspected of being the second man for quite a long time, Ford was not arrested until 1990. On federal habeas review, 2 issues are presented, one involves admission of hearsay statements of Temple implicating Ford in the crimes and the other involves admission of evidence that Ford was on the FBI's Ten Most Wanted List.

Hearsay Statements Inadmissible But No Error Where No Showing of Actual Prejudice

The hearsay statements of Temple were admitted through Temple's wife Leila Gregory. She told the jury that on the night before the robbery Temple told her that he and Ford had stolen a car and that on the morning of the robbery Temple told her he was going to meet Ford and she would not "want for anything ever again." The trial court initially would not allow the statements to be admitted. On cross of police officer Sanders, however, defense counsel asked if the investigation of Ford was the result of statements made to the police by Gregory. On redirect examination, the prosecutor elicited testimony that Gregory told him of Ford's involvement in the car theft. The trial court then held that Temple's statements to Gregory would be admissible for the non-hearsay purpose of showing why police suspected Ford and stated that a limiting instruction would be given to the jury directing them as to the appropriate consideration of the statements. Gregory was recalled as a witness and testified to the statements. A limiting instruction was never given. The prosecutor in closing argument used the statements as evidence of Ford's guilt.

The 6th Circuit finds that Ford cannot prove actual prejudice resulted from the admission of the hearsay statements and the trial court's failure to give a limiting instruction. There was "ample evidence," even excluding the statements, to find Ford's guilt, specifically eyewitness identification by 2 witnesses of Ford as the second man and circumstantial evidence linking Ford to the crimes because of his sudden wealth following the robbery.

Evidence That Defendant Is on FBI's Most Wanted List Is of "Nominal Relevance"

The Court of Appeals also concludes that actual prejudice did not result from the admission of the "bad acts" evidence indicating that Ford was a dangerous felon. The Court does note that references to the FBI's Ten Most Wanted List and to *America's Most Wanted* is of "nominal relevance and prejudicial." ■

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Are Hair Comparisons Reliable?

Last year's meeting of the American Academy of Forensic Sciences featured the following abstract:

"Because of the serious problems with the microscopic examination of hair that have recently been revealed the authors make the following recommendations regarding these types of examinations: Mitochondrial DNA sequencing should be the preferred method for comparing both human and animal hairs. Microscopic examinations should be retained only as screening tools. The results of microscopic comparisons of hairs should not be presented in court unless verified by mitochondrial DNA sequencing."

Rowe and Foran, "Is it Time to Stop Microscopic Hair Comparisons," AAFS Annual Seminar (Feb. 2001).

Caveat Nemo Habeas Corpus (or, Why District Court Practitioners Should Quit Worrying and Love the Writ of Habeas Corpus)

Robert Stephens

The prosecutor, slack-jawed and dumbfounded, looks at you with complete sincerity and says, "Huh?" The circuit judge, incredulous yet maintaining an air of dignity, leans over the bench and politely opines, "Son, I don't think you can do that in this courtroom." You shuffle your papers at the podium and begin again to ask the court for a writ of habeas corpus. After hours of painstaking research, you have uncovered the following sample writ, which you dutifully show the judge**:**

> Habeas corpus ad subjiciendum Rex J.L. militi, gardiani prisonae nostrae de le Fleet, salutem. Praecipimus tibi quod corpus W.E. militis in prisona nostra sub custodia tua detentum, ut dicitur, una cum die et causa detentionis suae, quocumque nomine praedictus W.E. censeatur in eadem, habeas coram nobis [tali die] ubicumque tunc fuerimus in Anglia, ad subjiciendum et recipiendum ea quae curia nostra de eo adtunc et ibidem ordinare contigerit in hac parte. Et hoc nullatenus omittatis periculo incumbente. Et habeas ibi hoc breve. Teste etc.
> J.H. Baker, *An Introduction to English Legal History*, 3d Ed., 1990, p. 626.

The judge peruses the object of your research, pauses in reflection, and with a raise of his brow states, "Young man, I know you can't do that in this courtroom." Your motion is denied, and you slink from the courtroom wondering exactly what about using this ancient writ of liberty is supposed to be so advantageous.

It does not have to be this way. District court practitioners possess a powerful tool in the petition for a writ of habeas corpus, but often shy away from its use because an unnecessary fear of this gentle, if misunderstood, beast. The main problem to overcome in using habeas corpus is our own fear. We will begin with a brief overview of the history of the writ, and move on to ways we can use the writ of habeas corpus in district court practice.

A Brief History of the Writ
(Musty Stuff, Long Forgotten, but Interesting if You or Your Judge Like that Sort of Thing)

Going through the complete history of the writ of habeas corpus would take far too long for an article dealing with its practical use in a modern Kentucky district court. It would also bore most practitioners to tears. A brief overview of how the writ first developed is, however, worth telling and may prove useful if the circuit judge before whom you bring the motion enjoys a little sprinkling of history now and then.

The writ of habeas corpus was born in a time when administrative method and legal procedure were as yet conjoined, and originally was simply a command from the King to one of his officers. Plucknett, *A Concise History of the Common Law*, 5th Ed., 1956, p. 57. Ironically, habeas corpus, the ancient writ of liberty, arose as a device to ensure the opposite of freedom, for the Latin words "habeas corpus" or "have the body" at first were used to place persons **into** custody. J.H. Baker, *An Introduction to English Legal History*, 3d Ed., 1990, p. 168. There were several types of habeas corpus writ during the reign of Edward I, used, for example, to hail defendants or jury members before the court. Plucknett, p. 57.

Over the years, however, the writ of habeas corpus developed into what one commentator has called "'the highest remedy in law for any man that is imprisoned,'" quoted in *Id.* p. 58. None other than Blackstone called the writ of habeas corpus "the most celebrated writ in the English law." William Blackstone, *Commentaries on the Laws of England*, Vol. 3, p. 129.

Suffice it to say that for a writ which had a bad start, habeas corpus grew into a fine finished product.

The Basics of Habeas Corpus (or, What Everybody Needs to Know about "Have the Body")

Many of us have needlessly feared using the writ of habeas corpus, in part because of its revered history. So doing, we appropriately appreciate its strength as an ancient protector of personal liberty, but cloak the writ in pointless mystery and confusion. The writ of habeas corpus, contrary to our erstwhile imaginings, is actually quite a friendly animal, powerful when guarding its friends, but also easily tamed.

For the district court practitioner, the pertinent provisions of the Kentucky Revised Statutes (KRS) dealing with habeas corpus amount to no more than two pages in *Criminal Law of Kentucky, 2000-01*. (West Group, p. 614-15). Indeed, the simplicity of using habeas corpus is demonstrated in that a **mere paragraph** (two measly sentences) tells the district court practitioner all he or she needs to know to "get into court" to use the writ of habeas corpus.

Let us start with the relevant statute. KRS 419.020 reads:

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"The writ of habeas corpus shall be issued upon petition on behalf of anyone showing by affidavit probable cause that he is being detained without lawful authority or is being imprisoned when by law he is entitled to bail. The writ may be issued by any circuit judge on any day at any time and his power to issue such writs shall be co-extensive with the Commonwealth." *Id.* 614.

That is it. Two sentences tell all you need to know to effectively start the proceeding for writ of habeas corpus. Specifically, there are five points which, when enumerated, show exactly what is needed before the circuit court judge will issue a writ of habeas corpus, as well as in what manner and time the court may do so.

1. Style the proceeding as follows: Client's Name v. Name of the person with custody of the client's body (*i.e.*: the jailer). This hearkens back to where the writ of habeas corpus got its name. The jailer or other person with physical control over the client's body must appear in circuit court to show the lawfulness of his or her custody over the detained person.

2. Attach an affidavit to the motion (read motion as "petition," in the wording of the statute), stating the grounds which you contend show your client is being unlawfully incarcerated. What I have done when filing motions for writ of habeas corpus is to state my grounds in the body of the motion, and attach an "affidavit" to the motion, signed by myself or the client, stating that the information contained in the motion for writ of habeas corpus is true and correct to the best of the affiant's knowledge and belief.

3. The writ of habeas corpus is not discretionary. The court must (the statute says "shall") issue the writ once probable cause has been shown that your client is being detained unlawfully or is being held when he is by law entitled to bail. The court cannot determine under the circumstances, despite the showing of probable cause as to his unlawful detention, that the defendant should nonetheless remain incarcerated and no writ should issue commanding his appearance before the court. Once you have shown probable cause that your client is being held unlawfully, he is brought before the circuit court judge.

4. All you have to show is probable cause. We have all defended enough clients at preliminary hearings to know probable cause is a very low standard. Basically, as long as you are acting in good faith, just about any allegation of unlawful detention should get your writ issued and your client brought before the circuit court for a hearing.

5. Do not worry about where you file the motion/petition. Granted, it is usually a good idea to file your motion/petition with the circuit court in the county of your district court, as a matter of appropriate "venue." One is not so constrained, however, because the statute says the writ may be issued by "**any** circuit judge on **any** day at **any** time," anywhere in the Commonwealth. *Id.* at 614 (emphasis added). The real importance of this provision arises when you have a client incarcerated (as I have had with juveniles and women) in another county because the detention center in the county in which the person is charged cannot hold that class of person. You do not have to file the motion/petition for writ of habeas corpus in the circuit court of the county in which the person is being detained, though you can do so if that is preferred for some reason.

Once you get a hearing, present evidence just like in civil court. KRS 419.100. You can call witnesses at the hearing and present physical evidence. In fact, you can use **depositions** to collect evidence to be used in the hearing. This provision is an amazing resource which is hardly ever used. The opportunity for discovery alone in so preparing for the habeas corpus hearing is beyond measure. Depositions can be a powerful discovery device not otherwise available to criminal lawyers. They also can be very effective in speeding up the actual habeas corpus hearing, since the relevant evidence can be gathered beforehand and tendered to the judge for reviewing at his convenience before the hearing. Whether to use depositions or more conventional testimony is a judgment call for the practitioner, and the decision to use either or both will depend on the circumstances of the case and the lawyer's personal style. One would be foolhardy, however, to offhandedly ignore the potential benefits accruing from the rarely available deposition.

If the circuit judge finds that the detention of your client is for whatever reason unlawful, he can set your client free (or can grant a more reasonable bond, as described below). KRS 419.110. That perhaps is the true strength of habeas corpus: its hearing is summary, its relief is immediate.

One brief aside to clear up a matter which caused myself some consternation in the past. Technically speaking, the issuance of a writ of habeas corpus does not release your client. (Though sometimes your judge will issue an order saying exactly that). The writ correctly is the device, upon a showing of probable cause, which gets your client a hearing. The judgment at the end of the hearing is what can release your client. This is a technical point, and certainly the semantics of whether your client is released by the writ of habeas corpus or after a hearing upon the writ of habeas corpus are unimportant as long as your client obtains the relief sought. Clarity, when attainable, is best, and I include this semantic distinction for the better understanding of this ancient legal tool.

Either side can appeal the court's decision. KRS 419.130 (1). This does not vitiate the strength of habeas corpus relief, for it provides an outlet for you when your client is denied the relief sought, and the Commonwealth cannot undo a judgment in your favor without showing some good faith reason for appeal. Appeal must be made within thirty days of entry of judgment by filing with the clerk of the court the original record, a transcript of the evidence, and a notice of appeal. *Id.* The notice of appeal must be served on all parties at least two days before the appeal is filed. *Id.* One thing to note is that, according to KRS 419.130 (2), if the judge orders the release of your client, and the commonwealth intends to appeal, and the commonwealth so notifies the judge, the judgment may be stayed (evidently by the judge who granted the release). The Court of Appeals can continue, modify, or set aside the stay pending the appeal. *Id.*

This can be looked at a number of different ways. One, is it likely that the circuit judge, upon finding the detention truly unlawful, will then order a stay on his own decision? Two, does your prosecutor even know the judgment can be stayed pending appeal? Will he find out in time so as to avoid the request for the stay seeming vindictive? It is reasonable to argue that, unless the prosecutor, immediately upon the judge's decision in your favor, can articulate cogent reasons to stay the judgment pending appeal, there is no reason for the judge to stay the judgment pending appeal. Anything cooked up afterwards would seem to qualify as prosecutorial vindictiveness. Three, if your circuit judge is balking on granting the relief requested, perhaps he or she will go halfway. Perhaps the judge will grant your requested relief, on the understanding that the Commonwealth will appeal, and he can grant a stay pending review by the Court of Appeals. This latter approach could be another way to get your relief request before another court, even farther removed from district court, when the circuit court judge is unwilling to unabashedly "do the right thing." This approach, of course, is one which anticipates a relatively lengthy appeal procedure, which will not work in all cases.

The Appeal of Appealing Bond Decisions by Habeas Corpus

It is a measure of the simplicity of using habeas corpus for appeal of bond from district court to circuit court that the Kentucky rule of criminal procedure dealing with the procedure is so brief. RCr 4.43 (2) states: "The writ of habeas corpus remains the proper method for seeking circuit court review of the action of a district court respecting bail."

If anything, appeal of district bond decisions through habeas corpus is even easier than seeking relief on other grounds, for you do not have to articulate the specific unlawfulness of the imprisonment of the defendant. Correspondingly, there is one less layer of mystery to this use of habeas corpus: habeas corpus is simply the vehicle by which one appeals district bond decisions to circuit court. You may need to remind (or inform) the circuit judge that a habeas corpus proceeding is the method by which one appeals bond decisions from district court, because this provision is so rarely utilized. As you begin to argue your motion, eliminate the mystery which too often accompanies the petition for writ of habeas corpus, by stating that this is the way appeals of bond to circuit court are made. One can clear away the confusion and still maintain the inherent strength of this ancient writ of liberty.

File the motion/petition for writ of habeas corpus, present evidence at the hearing, and in all other ways treat the appeal of bond from district to circuit court exactly as if you were conducting any other habeas proceeding. Once at the hearing, treat it as any other adversarial bond hearing. Your objective, of course, is to show that the district court bond is unreasonable. A final note in regards to appealing bond decisions by habeas corpus. You may want to consider attaching the records of the pretrial services officer to your motion/petition. If the officer will not cooperate, subpoena the records to your hearing. This can provide invaluable information for the circuit judge, particularly if your client "scored low" and was thus entitled to a lower bond than he or she received.

Knowing When to Fight

As with any struggle, it is important to know when to fight; and of course, when not to fight. Not every lousy bond in district court is worth appealing to circuit court by writ of habeas corpus. Likewise, not every client's situation will warrant a habeas corpus proceeding releasing him from detention. We can overuse the writ of habeas corpus, just as in war one can fight on too many fronts, and dilute the strength of one's forces. This is particularly true for public defenders, who cannot choose to which cases we are appointed. I do not advocate abandoning clients to the proverbial wolves, but public defenders' abilities are not superhuman (although it is arguable that their wills are so), and we must be careful to use our strongest tools with caution, for the sake of all our clients.

The determination of when to appeal a district court bond decision depends on a multitude of factors. Relevant facts and circumstances include: the defendant's criminal history, the nature of the alleged crime, the character of the alleged victim, the defendant's mental health status, and the amount of bond normally set in the court for the same charge. Virtually anything could prove relevant to the question of whether the defendant's case warrants a bond appeal or an attempted release from detention. The main thing is to consider, in light of the facts and circumstances of the particular client and case; whether **this** case, with **this** client, is a good one to appeal the district court bond decision or to fight for your client's outright release.

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Conclusion

The writ of habeas corpus is a powerful, though often over-mystified, tool. Habeas corpus can provide immediate relief for a district court client who is being held without legal cause or who is incarcerated because the district court judge will not grant a reasonable bond. The district court practitioner can provide himself or herself with one more weapon to combat the feeling of powerlessness associated with dealing with only one decision-maker. You can tell your client, upon hearing a bad decision from a district court judge, that this is not the only court before whom you can litigate. You can subtly tell the judge that his or her decisions are not final, that relief is available when the court oversteps its authority. As I hope we have discovered, the real trick to using the writ of habeas corpus is in finding the courage to use it at all, overcoming the fear of this gentle legal animal for the benefit of our clients. ■

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COMMONWEALTH OF KENTUCKY
34TH JUDICIAL DISTRICT
MCCREARY DISTRICT COURT
CASE NO. _____

_____ PETITIONER

VS. **AFFIDAVIT**

RAY PERRY, JAILER
MCCREARY COUNTY JAIL RESPONDENT

I, _____, after being duly sworn, state that I have read the Petition for Writ of Habeas Corpus and that the allegations and statements contained herein are true and correct to the best of my knowledge and belief.

Subscribed and sworn to before me by _____ on this the _____ day of _____, 2001.

_____
NOTARY PUBLIC
STATE AT LARGE, KENTUCKY

My commission expires:_____

COMMONWEALTH OF KENTUCKY
34TH JUDICIAL CIRCUIT
MCCREARY CIRCUIT COURT
CASE NO. ____

_____ PETITIONER

VS. **PETITION FOR A WRIT OF HABEAS CORPUS**

RAY PERRY, JAILER RESPONDENT
MCCREARY COUNTY JAIL

Comes now the defendant, pursuant to Sections 1, 2, 3, 16, 17, and 115 of the Constitution of the Commonwealth of Kentucky, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, *Abraham v. Commonwealth*, Ky.App., 565 S.W.2d 152, and RCr 4.43(2), and petitions the Honorable Court for relief by Writ of Habeas Corpus, in the lowering of his bond from its current unreasonably high amount, to the amount of $3,000,10%. In support of this motion, the defendant states as follows:

1. On August 9, 2001, the defendant's bond was amended from "No bond" to $25,000 fully secured. (See attached copy of District Court jacket and file).

2. The defendant is unable to make that unreasonably high bond, and requests this Honorable Court for relief by a lowering of his bond to $3,000,10%.

WHEREFORE, the defendant moves the Court for relief by Writ of Habeas Corpus, in the lowering of his bond as mentioned above, and for any other relief entitled to him.

Respectfully submitted,

_____
Robert E. Stephens, Jr.
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KENTUCKY CASELAW REVIEW

Euva Hess

Dunaway v. Commonwealth
Ky., 60 S.W.3d 563 (11/21/01)
(Affirming)

In June 1998, police arrested Dunaway and two cohorts, later co-defendants, for a series of armed robberies in Jefferson County. At the time of his arrest, Dunaway was on parole. Dunaway returned to Northpoint Training Center to serve the remainder of his sentence on the prior charge. While at Northpoint, Corrections lodged a detainer. In September 1998, Dunaway filed a motion for speedy trial citing KRS 500.110 which requires the state to prosecute the offenses underlying the detainer within 180 days of a speedy trial request. In January 1999, Dunaway served out his sentence on his prior conviction; however, he remained incarcerated because he could not make bond on the pending charges. In August 1999, Dunaway stood trial on two counts of robbery. The jury convicted and Dunaway pled guilty to the Persistent Felony Offender count. He appealed these convictions to the Kentucky Supreme Court.

Speedy Trial Rights under KRS 500.110 lapse if prisoner serves out before the end of the 180-day period. Detainers have a significant effect on prison life. Detainers limit prisoners' placement to certain institutions and limit their activities within the institution. For this reason, the Legislature enacted two statutes, KRS 500.110 and KRS 440.450, which outline the procedure necessary for a prisoner to remove the detainer. The applicability of each statute depends on the jurisdiction entering the detainer. 500.110 governs detainers entered by the Commonwealth of Kentucky. 440.450 governs detainers lodged by other states.

Dunaway argued that his conviction violated KRS 500.110 because the Commonwealth did not prosecute the new indictment within 180 days after proper notice by the prisoner. Dunaway argued that his serve out prior to the termination of the 180-day period was immaterial because he was incarcerated with a detainer at the time of his speedy trial request. This was an issue of first impression in Kentucky. Because the Court found substantial similarities between the statutes, the Court relied on precedent analyzing the interstate act. The Court adopted the position taken in other jurisdictions that the need for protection from detainers evaporated once the prisoner has been released. Moreover, the Court pointed to language in both statutes which "explicitly refer to the 'continuance' of a term of imprisonment." Because Dunaway served out his sentence on the prior charge before the lapse of the 180-day period to prosecute afforded the Commonwealth by statute, the Commonwealth did not violate Dunaway's statutory right to a speedy trial.

Although Dunaway asserted his right and the length of delay, 13 ½ months, was presumptively prejudicial, because the reasons for delay were acceptable and the prejudice to Dunaway was minimal, his constitutional rights to a speedy trial were not violated. Additionally, Dunaway argued the pre-trial delay violated his right to a speedy trial under the United States and Kentucky Constitutions. The Court employed the four factor test enunciated by the United States Supreme Court in *Barker v. Wingo,* 407 U. S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In its analysis, the Court balanced the length of delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant caused by the delay.

Still relying on *Barker* the Court found the length of delay presumptively prejudicial based on the seriousness and moderate complexity of the charges and the 13 ½ month delay between arrest and trial. The Court found the reasons for delay, in part, Dunaway's fault or neutral reasons based on the court or the Commonwealth's calendar. The Court found no attempt by the Commonwealth to cause a purposeful delay designed to inhibit the defense. The Court found that Dunaway did assert his right to a speedy trial but found his assertion "did not weigh as heavily as it might" because he filed "frivolous petitions," requested one of the continuances, and "never mentions voicing a single objection" to the trial court. The Court did not find unusual anxiety to Dunaway, nor was the court convinced that if the Commonwealth had gone to trial earlier, the Commonwealth would not benefit from the co-defendant's testimony implicating Dunaway.

Commonwealth v. Higgs
Ky., 59 S.W.3d 886 (11/25/01)
(Affirming in Part and Reversing in Part)

Christopher Higgs admitted that he killed his former employer, Charles Endicott, but claimed he did so in self-defense. Higgs stole a gun from Endicott, which he swapped with his brother-in-law for another gun. Endicott discovered the theft and became enraged. Another Endicott employee, Bill Brewer, believed Higgs stole a rifle from him. In the months prior to his death in the hearing of Higgs' mother and father, Endicott threatened to assault or kill Higgs. Higgs' family told him of the threats. In November 1995, Endicott found out where Higgs lived. He and Brewer confronted Higgs. Higgs said he had Endicott's gun but it was at his father's farm. After a futile attempt to call Higgs' dad, Endicott and Brewer forced him into their truck. They were going to get Endicott's gun. The group stopped along the way so Brewer could buy cigarettes at the convenience store. At the store, Endicott and Higgs waited in the truck. Higgs said that Endicott threatened him and punched him in the chest. Higgs testified he then drew his gun. When Endicott tried to grab the gun, Higgs shot him. The jury convicted Higgs of second degree

manslaughter. Higgs appealed his ten-year sentence to the Kentucky Court of Appeals. The Court of Appeals reversed the conviction agreeing with three of the four alleged errors. The Kentucky Supreme Court took the case on review and cross review.

The jury was improperly instructed to apply an objective standard in determining Higgs' right to use deadly force for self protection; however, the error was harmless. The Kentucky Supreme Court and the Court of Appeals agreed that the trial court instructed on the wrong standard. However, the courts disagreed on the prejudicial effect of the error. The instruction concerning Higgs' right to use deadly force said in effect, "if the jury believed Appellee was not actually being (or about to be) kidnapped, as that offense is defined in KRS 509.040, but was only being (or about to be) unlawfully imprisoned as defined in KRS 509.020 and KRS 509.030, then he was not authorized to use deadly physical force in self protection regardless of what he himself believed." The Supreme Court found this error because the focus is on the defendant's "actual subjective belief in the need for self protection and not on the objective reasonableness of that belief." *Commonwealth v. Hager*, Ky., 41 S.W.3d 828, 836 (2001). The Court found the error harmless because the language of this instruction did not pertain to the instruction under which the jury found Higgs guilty.

Evidence of specific conduct, to wit threats by the victim, opened the door for the Commonwealth to present rebuttal evidence of the victim's reputation for peacefulness. The Court of Appeals held that evidence of Endicott's reputation for peacefulness was not admissible simply because Higgs introduced specific instances of conduct relating the threats against Higgs and violent acts against others. Higgs argued and the Court of Appeals agreed that the purpose of this evidence was to show Higgs fear of Endicott, not to prove that Endicott acted in conformity therewith or to show Endicott was the first aggressor. Thus, rebuttal evidence was not admissible.

The Kentucky Supreme Court disagreed. The Court held that KRE 404 (a)(2) permitted rebuttal evidence in two circumstances: (1) when the defendant introduces character evidence in any criminal case to prove that the victim acted in conformity therewith on the occasion at issue; and (2) when the defendant introduces any evidence in a homicide case to prove that the victim was the initial aggressor. Analyzing these two exceptions, the Court held that if the same evidence that proved the defendant had reason to fear the victim also proves that the victim was a person of violent character who acted in conformity therewith on the occasion at issue, the prosecution can rebut the evidence of the victim's character for violence with evidence of the victim's character for peacefulness.

Price v. Commonwealth
Ky., 59 SW3d 878 (11/21/01)
(On Discretionary Review from the Court of Appeals, Affirming)

As he drove home in November 1995, Fish and Wildlife Officer Russell Wolfe, came upon Earl Fields and Denzil Price. Fields drove his truck recklessly. Officer Wolfe stopped the truck when it pulled into the driveway of Price's home. Both men appeared very drunk. Wolfe released Price since he was at home, but detained Fields. Price went in the house and came out with a shotgun. He approached Officer Wolfe and pointed the gun at Wolfe's head. Wolfe grabbed the gun, pushing the barrel down. The gun went off, wounding Wolfe in the leg. Since the victim was the investigating officer, he sat at counsel table throughout the trial. During the Commonwealth's closing argument, the prosecutor picked up the shotgun and pointed it at Wolfe's head. Wolfe pushed the barrel of the gun down toward his leg. Defense counsel objected and moved for a mistrial. The trial court held an inquiry in chambers as to whether the re-enactment was planned or spontaneous. The Commonwealth and Wolfe claimed the demonstration was not planned. The court did not declare a mistrial but admonished the jury to disregard the demonstration.

The permissibility of Commonwealth's attorney and victim's re-enactment of the crime is an open issue; however, in this case, any error was harmless. Justice Cooper wrote the opinion in this case. Justice Lambert, Johnstone, Stumbo, and Wintershimer concurred. Justice Keller concurred by separate opinion. Justice Graves joined Justice Keller's opinion. The Justices agreed that the Court should affirm the conviction. However, the Court divided over a blanket ban on these sorts of demonstrations. Cooper wrote "Wolfe's participation in the reenactment of the crime during the prosecutor's closing argument whether planned or unplanned was highly improper." Cooper cited both criminal and civil cases which frowned upon demonstrations of this kind. Cooper found the demonstration harmless because the issue in the case was not whether Price shot Wolfe. Rather, the issue was Price's mental state at the time. The reenactment "neither proved nor disproved the necessary element of intent."

In his opinion, Keller emphasized that the courts should permit the re-enactment if it is an accurate portrayal of facts already in evidence. Keller opined that impermissible re-enactments were those that presented new evidence. In this case, the re-enactment was permissible because Wolfe testified at trial about the actions he and Price took the day that he was shot.

Fugate v. Commonwealth
Ky., 62 S.W.3d 15, (11/21/01)
(Affirming)

Fugate appealed his thirty-year sentence based on two counts of manslaughter in the second degree and one count of assault, third degree. The charges arose from a head on collision that occurred while Fugate was driving under the influence. As a result of the accident, two people died and two were injured. Fugate was among the injured. His injuries resulted in a painful paralysis that left him confined to a wheel-

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chair and required that he live in an assisted living environment. Fugate raised several issues on appeal.

Substantial evidence supported the trial court's conclusion that Fugate was competent to stand trial. At the competency hearing, the court appointed doctor and the assisted living home's staff testified that Fugate was competent. Dr. Powers testified that Fugate was malingering. The nursing home staff testified that Fugate engaged in normal every day activities like watching television, reading books, and conversation with the employees and other patients. Dr. Suzanne Johnson, the defense expert, testified that Fugate was not malingering. Fugate's sister testified in support of Johnson's opinion. Because the trial court entered extensive findings of fact which explained that the court found the testimony of Dr. Powers and the nursing home staff more credible, the Kentucky Supreme Court found no clear error.

Defense counsel can waive the client's right to present at the competency hearing. The Court declined to adopt the bright line rule proffered by the defense that only a defendant can waive his presence at a competency hearing. The Court instead relied on *Richmond v. Commonwealth*, Ky., 637 S.W.2d 642 (1982) (an attorney can waive a defendant's right to attend a pre-trial deposition that would be used as testimony against him at trial) and Justice Leibson's dissent *Dean v. Commonwealth*, Ky., 777 S.W.2d 900 (1989). The Court held, quoting Leibson in *Dean* "[h]ere, the waiver was explicit, and was made by counsel, presumably competent to judge whether his client was needed. I see no reason, constitutional or otherwise, to create a rule that counsel cannot waive his client's presence at depositions [or as hear, at a pretrial competency hearing]."

Second competency hearing not required after initial trial was delayed because Fugate was hospitalized. Fugate was admitted to the University of Cincinnati hospital prior to trial. As a result, defense counsel obtained a continuance. Prior to the new court date and subsequent to Fugate's release from the hospital, he requested an additional competency hearing. The Kentucky Supreme Court found no abuse of discretion by the trial court. The court had spoken with Fugate's attending physician who stated that Fugate could attend trial so long as he had oxygen made available to him. Moreover, the University hospital records did not demonstrate defects in Fugate's mental status.

Trial court did not abuse its discretion denying defense counsel's request that a defense-employed cameraman tape Fugate during the trial. The trial court's denial of Fugate's request to permit his own camera man to record the trial proceedings. Fugate stated that the purpose was to create a record for appeal of Fugate's demeanor and inability to assist trial counsel. The Kentucky Supreme Court found no abuse of discretion because the judge has "a right and obligation to maintain control over his own courtroom so as to minimize or prevent activities that might distract the jurors during the course of the trial." *Wilson v. Commonwealth*, Ky., 836 S.W.2d 872, 884-885 (1992), *cert. denied* 507 U.S. 1034 (1993); *Preston v. Commonwealth*, Ky., 406 S.W.2d 398, 404-405 (1966). Moreover, per SCR 4.310, "unofficial recordings are not admissible upon any appeal of such proceedings."

Admission of evidence concerning the blood alcohol presumption was harmless error. At trial, "the Kentucky State Police officer who investigated the accident testified that the blood level for which a state trooper will customarily make an arrest for driving under the influence is 'per se, point one.'" Evidence of this presumption is inadmissible in any criminal case other than driving under the influence cases. The Kentucky Supreme Court found the evidence harmless in this case because there was sufficient additional evidence of Fugate's intoxication, to wit: full and empty beer cans found in Appellant's truck, the results of Appellant's blood test after the crash, and the testimony of other witnesses who either saw appellant drunk or were forced from the road by his erratic driving.

The trial court did not err by refusing to allow Fugate to introduce evidence of his reduced life expectancy during the penalty phase. At the time of Fugate's trial, KRS 532.055 (2)(b) allowed mitigation evidence to the extent it pertained to the defendant's criminal history. Since Fugate's reduced life expectancy did not pertain to his criminal history, the trial court did not permit the evidence. KRS 532.055 (2)(b) was amended in July 1998 to permit evidence in mitigation or in support of leniency. Fugate argued that the amendment should apply to him retroactively. The Kentucky Supreme Court disagreed because the amendment was passed after Fugate's final sentencing.

Justice Keller wrote a dissenting opinion. Keller opined that the trial court erred by conducting the competency hearing without Fugate's presence. He opined the trial court should have ascertained whether Fugate "himself, knowingly, voluntarily, and intelligently waived his right to appear." According to Keller, the assertion of a waiver should not satisfy the court, especially in this case, where the record did not demonstrate that counsel "purported to communicate Appellant's own wishes or that he spoke with Appellant's authorization when he waived Appellant's right."

Rogers v. Commonwealth
Ky., 60 S.W.3d 555, (11/21/01)
(Affirming)

Rogers appealed his twenty year sentence based on his conviction on First Degree Manslaughter, and three Counts of second degree Wanton Endangerment. This case arose out a feud between the Rogers brothers and James Irvin and Larry Taylor. The rivalry climaxed and ended with a shoot out at a BP Station in Waco, Kentucky. The shootout left Irwin and Taylor dead. At trial, a hotly contested issue was which man was the first aggressor. The jury acquitted Rogers of Irvin's death.

On appeal, Rogers argued that the trial court committed reversible error by excluding the testimony of Michelle Agee. The trial court permitted the Commonwealth's witness Jennifer Baker to testify. She testified about a conversation between her, Michelle Agee, and Paul Rogers. On cross, Baker denied telling Agee that Taylor and Irwin discussed "taking care" of the Rogers brothers. If given the opportunity, Agee would have refuted Baker's denial.

Testimony of the witness was admissible as a prior inconsistent statement or a statement of then existing mental, emotional, or physical conditions. This case drew a number of concurrences and dissents. Justice Keller wrote on behalf of the Court. Justices Graves, Johnstone, and Wintershimer concurred. Chief Justice Lambert wrote the dissenting opinion in which Cooper and Stumbo joined. The Kentucky Supreme Court held that the trial court erred in excluding the testimony. Although Agee's testimony was double hearsay, it was admissible as a prior inconsistent statement under KRE 801A(a)(1) and under KRE 803(3) as "then existing, mental, emotion, or physical conditions." Although error, the Supreme Court held the error harmless. No substantial possibility existed that the jury's verdict would have been any different. Agee's testimony did not establish whether Rogers or Taylor was the first aggressor.

The trial court did not err by allowing the Commonwealth to admit a photograph of the victim with his family. Additionally, the Court held that the trial court did not abuse its discretion by admitting a photograph of Taylor with his wife and children. The Court did not find that the photograph was likely to induce undue sympathy or hostility.

In his dissent, Lambert did not opine the exclusion of Michelle Agee's testimony harmless. Lambert specifically contended that exclusion of Agee's testimony severely weakened Rogers claim of self-defense with respect to Taylor's death. Lambert found this significant because Rogers was acquitted, on self-defense grounds, of Irwin's murder.

Marshall v. Commonwealth
Ky., 60 S.W.3d 513, (11/21/01)
(Affirming)

Tyrone Marshall appealed his life without parole for 25 years sentence based on his conviction for murder, attempted murder, and burglary, first degree. Three men invaded the home of Mr. and Mrs. Fink. The men were later identified as Mark Downey, Richard Strode, and Tyrone Marshall. Sharon Downey, Mark Downey's wife and Tyrone Marshall's ex wife, drove the men to the Fink home. Fink had just retired as a pawnbroker and recently closed down his store. Because of this, the men knew the Finks would have a significant amount of cash and jewelry in their home. The men tied up Mrs. Fink and left her on the kitchen floor. One man escorted Mr. Fink around the house to collect the valuables. Subsequently, the men tied up Mr. Fink. Just before leaving the house, Mark Downey shot the Finks. Mrs. Fink died; Mr. Fink survived. Upon completion of the robbery, the men and their respective wives, girlfriends, and children went to Cincinnati. The men sold some of the jewelry but were caught a few days after the crime. Mark Downey pled guilty admitting his role as the ringleader and triggerman. Tyrone Marshall was convicted by bench trial.

The trial court did not err by finding Marshall guilty of intentional murder. On appeal, Marshall argued that he could not be convicted of intentional murder because he did not know Mark Downey's burglary plan included killing the Finks. Although recognizing that the felony murder doctrine was abrogated with the adoption of the Model Penal Code, the Kentucky Supreme Court found Marshall could be convicted under the complicity statute. Under KRS 502.020 (2) Marshall could be found guilty if he was either "complicit in the result" or "complicit to the act." The Court found Marshall complicit to the act, because his intent that the Finks be killed could be inferred from his conduct or knowledge. Immediately prior to Mark Downey pulling the trigger, Tyrone Marshall allegedly told Downey he did not want to be present when the Finks were shot. Both the trial court and the Kentucky Supreme Court used this statement coupled with other testimony that Marshall assaulted Mr. Fink by kicking him and knocking him over in his chair, as evidence that Marshall intended the Finks' murder and attempted murder.

Commonwealth's failure to prove witnesses were unavailable was harmless error. The Commonwealth introduced statements made by Richard Strode through his father's testimony at trial. Wilbur Strode testified that Richard told him he did not have a gun during the burglary; he had a can of pepper spray. Defense counsel objected on hearsay grounds. Yet, the trial court admitted the testimony as a statement against penal interest. The trial court accepted the Commonwealth's assertion Strode was unavailable without any proof of an attempt by the Commonwealth to procure his presence. The Kentucky Supreme Court found error based on *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). "In order to satisfy the requirements of the Confrontation Clause, the prosecution must at least make a good faith effort to obtain the declarant's presence at trial." *Barber* at 724-725. Because the trial court found that Mark Downey carried the only gun during the burglary, the Supreme Court held the error harmless.

Other hearsay testimony by the witnesses was admissible as the hearsay statements were in the course or furtherance of the conspiracy or based on personal observation. All of the evidence linking Mr. Marshall to this crime came from the testimony of Sharon Downey and Kim Long, wives of Marshall's co-defendants. On appeal, Marshall argued that much of Downey and Long's testimony was inadmissible hearsay because the statements were not made in furtherance of the conspiracy. Sharon Downey testified to statements made by Mark Downey before and after the commission of the burglary. The Court found that since Sharon was a co-conspirator, the statements were admissible under KRE

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801A(b)(5). The remainder of Mrs. Downey's testimony as to what occurred in Cincinnati after the burglary was admissible because it was based on her personal observations.

Kim Long testified to a conversation that occurred while she, Mark Downey, Richard Strode, and Tyrone Marshall sat in the living room listening to the police scanner after the burglary. Mark did most of the talking and described their respective roles in the burglary/shooting. It was through Long's testimony that the Commonwealth was able to get in the statement by Marshall to Downey that he did not want to be present while the Finks were shot. The Court found Mark Downey's recitation of this statement to Long admissible as an adoptive admission by Marshall under KRE 801(A)(b)(5). Marshall was present when Downey repeated his words and did not deny making the statement.

The trial court is not required to colloquy the defendant where there is a written waiver of defendant's right to a jury trial. On appeal, Marshall also argued that the waiver of his right to a jury trial was insufficient because, although he had tendered a written waiver, the trial court held no discussion with him on the matter. The Court found that R.Cr. 9.26 only requires a written waiver. Thus, the writing presumes voluntariness and does not require further investigation by the court.

Combined Truth-in-Sentencing hearing and capital hearing is ok in a bench trial. Marshall also argued that the trial court erred by holding a combined truth-in-sentencing hearing and capital sentencing hearing. Since Marshall's counsel acquiesced, the Court reviewed for palpable error. The Supreme Court recognized its previous ruling in *Francis v. Commonwealth*, Ky., 752 S.W.2d 309 (1988) and *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148 (1996) *cert. denied* 519 U.S. 855 (1996) that in death penalty cases, the capital penalty hearing should precede the truth-in-sentencing hearing because parole eligibility is only admissible in the latter. The Court found the error harmless because this was a bench trial and there was no possibility the result would have been different.

Additionally, the Court held that Mr. Marshall's sentence was not cruel and unusual punishment simply because it was the same as Mark Downey's, a more culpable co-defendant. The Court also reiterated that video taped records does not deny defendants of effective assistance of appellate counsel.

Geary v. Commonwealth
Ky., —S.W.3d——, (12/27/01)
(Opinion and Order Dismissing Appeal)
(Motion for Reconsideration Pending)

The Supreme Court held that Mr. Geary entered a valid agreement with the Commonwealth whereby he gave up his right to appeal trial errors in exchange for judge sentencing. The Commonwealth agreed to waive its right to appeal its objection to dispensing with the penalty phase of trial. The Court found that Mr. Geary knowingly and voluntarily waived his appeal based on his colloquy with the court. Moreover, the Court held that Mr. Geary committed "fraud upon the court" in his pro se motion for belated appeal when he denied knowledge or participation in the waiver. Thus, a party may use CR 60.02 to attack appellate court orders, proceedings, etc.

Estep v. Commonwealth
Ky., —S.W.3d —, (1/17/02)
(Reversing and Remanding)
(Not Yet Final)

The Kentucky Supreme Court granted discretionary review in this case. Estep appealed his conviction from his retrial on reckless homicide. The court reversed and remanded for a third trial.

The Commonwealth does not get an instruction that missing evidence would weigh in the Commonwealth's favor. The Supreme Court held that the Commonwealth was not entitled to a missing evidence instruction that allowed the jury to infer that the missing evidence weighed in favor of the Commonwealth. The Court reasoned that the Due Process Clause of the Fifth Amendment and Fourteenth Amendment does not extend to the Commonwealth. "[T]he purpose of a 'missing evidence' instruction is to cure any Due Process violation attributable to the loss or destruction of exculpatory evidence by a less onerous remedy than dismissal or the suppression of relevant evidence." In this case, the 'missing evidence' of primary concern to the Court was the Appellant's car which contained evidence of exterior damage and indentation attributed to a bullet by Appellant's expert. The car was repossessed before trial. The Supreme Court disagreed with the Court of Appeals that the error was harmless because the missing evidence would have supported Appellant's theory of defense based on self defense.

The failure of the reckless homicide instruction to properly allocate the burden of proof on the Commonwealth regarding self-defense or lack thereof was reversible error. The Supreme Court also held that failure of the reckless homicide instruction to properly allocate the burden of proof on self defense was reversible error. The burden was on the Commonwealth to demonstrate that when the Appellant shot the victim, he was not privileged to act in self-protection. The jury was instructed on the theory of self protection and possible role in mitigating guilt in a separate instruction. However, the Court reversed because the burden of proof was missing in the reckless homicide instruction.

Justice Wintersheimer dissented arguing that the separate instruction on self protection was sufficient and the missing evidence instruction was harmless error. ■

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DISTRICT COURT COLUMN

Discovery Motion Practice: What You Get, What You Might Get, and What You Owe

Part Three: What You Owe

B. Scott West

This issue continues this series on discovery motion practice with the third and final article, and discusses the defendant's obligation of reciprocal discovery – the discovery you *owe*. Please do not expect a litany of cases to be cited in this article; quite simply, there is no case law that delves into the finer points of reciprocal discovery. What does exist is regular discovery cases from which generalities can be extracted. These cases have been discussed in the previous parts of this article, and are not recounted here. The end of this article discusses what to do when the worst happens: Your evidence is not allowed because you either forgot to comply with reciprocal discovery or incorrectly misjudged your obligation to provide it.

I. Introduction

In a perfect world – that is, perfect from the perspective of a criminal defense attorney – the Commonwealth would owe the defendant everything in discovery, but the defendant would be allowed to try the Commonwealth by ambush. Sadly, it does not work that way. Asking for discovery from the Commonwealth creates a duty for the defendant to give certain discoverable items to the Commonwealth. The good news is that these certain items are few in number, and generally, will only be items which the defense thinks will be helpful, as opposed to harmful, in trial. The bad news is that there are exceptions to the rule; rabbit traps which the wary defense attorney can and must avoid with the exercise of due diligence. The discovery you owe is wholly contained in RCr 7.24(3).

II. Physical and Mental Examinations and Scientific Reports

RCr 7.24(3)(A)(i) provides in its entirety:

> If the Defendant requests disclosure under Rule 7.24(1), upon compliance to such request by the Commonwealth, and upon written request of the Commonwealth, the defendant, subject to objection for cause, shall permit the Commonwealth to inspect, copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony.

A. When the Reciprocal Obligation Attaches

From the plain language of the rule, the obligation to give the Commonwealth reciprocal discovery attaches *only if* the Defendant requests discovery under RCr 7.24(1). Obviously, one can avoid having to give reports of physical or mental examinations, or scientific reports to the Commonwealth by simply not asking for discovery for such materials under RCr 7.24(1). This is a risky practice. The Commonwealth has an obligation to give over all such reports relating to the case, regardless of whether they help or hurt the Commonwealth's case. In exchange, the defense attorney generally only has to give over those items which are helpful to the defense. (Again, there are exceptions to that; but normally, it is a lopsided exchange rate in favor of the defendant.) If the case boils down to a battle of the experts, where the outcome of the case will depend upon who has the best reports, it is better to guarantee that you know what the Commonwealth is going to say about the case, in advance. Defendant's expert, after all, gets to go last, and can fine-tune any testimony based upon what has preceded him.

The argument on the other side is that by requesting reports from the Commonwealth the defendant of course loses the advantage of surprise (though risking surprise by the other side). This surprise advantage is usually only valuable if the defense attorney (1) already has a report *in hand* which he or she *knows* will be damaging to the other side, (2) but which can be rebutted if the Commonwealth is given time to attack it, and (3) there could not possibly be a report in the possession of the Commonwealth which hurts the defense as much as this report *in hand* hurts the Commonwealth. Betting that you have all three of these factors is quite a gamble. Because you can really only guess that you have all three factors – you cannot be sure.

George Sornberger, formerly Trial Division Director for the Department of Public Advocacy and now a Capital Trial Branch Attorney, has stated during new attorney training that there might be that silver bullet document out there which is so damaging to the Commonwealth that it is worth not asking the Commonwealth for what is in its file. "But," he adds, "I have been practicing law for many years, and I have never seen one."

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Not asking for 7.24(1) discovery because you think your expert *might generate a report in the future* which you will not want to disclose is not gambling. It is being foolhardy.

Note: The rule says "upon compliance," ask that the Commonwealth affirm on the record that their discovery is complete prior to the defendant's obligation to turn over discovery materials.

B. "Possession" Again

As in RCr 7.24(1) and (2), subsection (3) requires that the duty of reciprocal discovery applies only to those items in the "possession" of the defendant. In the last article the definition of "possession" as it applies to the Commonwealth was discussed. *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694 (1994), was cited as authority that anything in the possession of a state agency is also in the possession of the "Commonwealth," at least, constructively. In coming to that conclusion, the Court reasoned that anything in the "immediate, physical control" of the Commonwealth was discoverable, and that this would include any records actually in the hands of a state agency.

The criminal defendant, as an individual, will not be in the immediate, physical control of any records of a state agency. However, any records in the custody of a state agency which will release the records to a DPA attorney (or any attorney, for that matter) simply upon the asking, or upon the signing of a release should be considered to be in the "possession" of the defendant. Individuals can get copies of their driving records, for example. If you plan to introduce one into evidence in the defense of your case do not rely upon the fact that the prosecutor can also get one as an excuse not to give them a copy. In short, if you can get it yourself, and you plan to use it, give it to the prosecutor.

As for any items which you procure by subpoena, remember that you have to file it in the court file regardless of whether you intend to use it at trial. Medical records of your client obtained by subpoena are available for use by all parties, and you cannot secrete or destroy them. This can be avoided by having your client execute a release of records obviating any need for subpoenas.

C. Control Your Experts!

Other than subpoenaed items, the only time the rule requires you to give the Commonwealth reports of examinations or scientific tests which you do *not* plan to introduce into trial as an exhibit occurs when the item has been prepared by a witness whom the defendant intends to call at trial, when the results or reports relate to that witness' testimony. Ideally, you will want to introduce into evidence everything your expert does on behalf of your client. The problem arises when your expert performs a test or experiment and the results are not favorable to the defense.

If it is not your practice to keep your experts under control, this can happen:

- A toxicologist or chemist performs a test on a blood or urine sample, without telling you, confirming the presence of the drug you hoped was not present;
- An accident reconstructionist wants to video the distance between a two car collision – unfortunately, he uses a lens which makes objects appear closer than they are;
- A mental examiner performs an IQ test on a person who previously tested below 70 on an IQ test; the new test has a result of 73.

In all of these instances, if you call the expert to the stand, you will have to have given to the prosecutor the results of these experiments. Your choice becomes either to not call that expert, or give over the results. Whatever you do, do not fail to give over the discovery, hoping that by not asking the expert about these subsequent tests on the stand, you can avoid disclosure of them because they do not "relate" to the witness's testimony. The moment a prosecutor asks whether the expert has performed any experiments of his or her own, the tests will relate to the testimony. Then, you are embarrassed, at best, as you have to give over at that moment the bad results of the test or experiments. Hopefully, the judge will grant a mistrial, because if he does not, this jury is going to hate you and mistrust you. Let us not even talk about sanctions or contempt of court.

How do you avoid this dilemma? First, you make sure that the expert knows exactly what he or she is going to do as an expert. Often, experts assume that they have the role of "finding the truth" or explaining discrepancies. That is what scientists do: they search for answers, methodically. When cast in the role as a defense expert, however, their role is often limited to examining and critiquing the procedures employed by the Commonwealth during its own tests or experiments. The expert's job is to poke holes in the work done by the Kentucky State Police Lab, for instance. The testimony is expected to consist of a list of reasons why the lab result cannot be trusted by the jury. The last thing the defense attorney wants the expert to do is to do the experiment correctly, and produce the same or similar result.

In the event that you *want* the expert to perform the test, be ready to declare that expert a consulting expert rather than a testifying expert in case the result comes out differently than you hoped.

Regardless, be sure you ask the expert to list everything he has done in the case before you call him or her to the stand. You do not want to learn during cross-examination about a lab test performed only the night before.

III. Books, papers, documents or tangible objects.

RCr 7.24(3)(A)(ii) provides in its entirety:

> If the defendant requests disclosure under Rule 7.24(2), upon compliance with such request by the Commonwealth, and upon motion of the Commonwealth, the court may order that the defendant permit the Commonwealth to inspect, copy or photograph books, papers, documents or tangible objects which the defendant intends to introduce into evidence, and which are in the defendant's possession, custody or control.

Just as subsection (i) tracks RCr 7.24(1), subsection (ii) tracks RCr 7.24(2). The same rules and practices that apply to subsection (i) apply also to (ii).

One troublesome difference is how the word "books" is handled. If you plan to enter a book into evidence (say a diary or a journal) – and let the jury take it back to the jury room as an exhibit – of course, you have to provide it in reciprocal discovery. But what if you plan to read only a passage, or cross-examine a witness with a book, under the "learned treatise" exception to the hearsay rule? Do you still have to disclose the book and tip the Commonwealth off that you intend to use the book?

Arguably, yes. The learned treatise exception, coded at KRE 803(18) provides:

> Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be **read into evidence but may not be received as exhibits.** (Emphasis added.)

Since the last phrase of the exception indicates that the treatise can be introduced as "evidence," even though the book cannot be taken back with the jury, subsection (ii) would seem to apply. On the other hand, it seems odd that you would have to identify for the Commonwealth an established, renowned work on a subject – the Physician's Desk Reference, for example – which you know from personal knowledge to be in the library of the County Attorney.

To help avoid the catastrophic result of not being allowed to read passages from a book into evidence, I employ the following rules of thumb. They are my rules, based not on legal authority, but on logic and common sense.

Thumb Rule One: If the expert witness who will be identifying a work as a learned treatise is my witness, I disclose the book. If the book is to be used to cross-examine a Commonwealth witness, I do not. Knowing what my witness will say before he or she takes the stand, I have advanced knowledge *o*f anything he or she will rely upon in a treatise before the trial even begins. It makes sense that I should be obligated to give advance warning to the Commonwealth.

However, not knowing what the Commonwealth's expert is going to say, I should be allowed free reign on cross-examination to determine whether the expert's opinion is well founded according to the published materials.

Thumb Rule Two: Regardless of whether the sponsoring witness will be mine or the Commonwealth's, if the learned treatise is not an established, well-known, reliable work (like the Physician's Desk Reference previously mentioned), but is a rather obscure, lesser known work, I disclose it. The judge has wide discretion whether to consider the book a learned treatise or not. If the judge has never heard of the book, it will take considerable expert testimony before the judge will allow passages to be read into evidence. Your own expert's testimony will be largely self-serving, so the judge will want to know if the Commonwealth's expert has an opinion on the book. If you have disclosed the name and author of the book to the Commonwealth – months ago – and the Commonwealth's expert has no opinion, or has not even been shown the book by the Commonwealth, the Commonwealth cannot be heard to complain when your expert recognizes the book as authoritative. Imagine:

> "Do recognize this book as authoritative?"
>
> "No, I've never even heard of the book."
>
> "You've never *even heard* of this book?"
>
> "No, that's what I said?"
>
> "Well, sir, we told the prosecutor that we were going to rely on this book as a learned treatise three months ago – and you have never been told that by the prosecutor?"
>
> "Er, no, I don't recall that I have."

At that point, counsel tosses the book back on the table. Later, you can use your own witness to testify as to its authority.

Thumb Rule Three: If this prosecutor, before this judge, has *ever* claimed in a previous trial that a particular treatise was authoritative, I do not disclose it as reciprocal discovery in my trial. The Commonwealth has established its knowledge of the work and its belief in its authority, eliminating any claim of unfair surprise, and making disingenuous any claim that the work is not really an authority.

Thumb Rule Four: Don't get too cute. Never claim that a

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work of obvious dubious authority is a learned treatise simply because you have an expert who says it is, and the other side does not. Anyone can get a book published. Rely upon only those books with generally positive reviews from the scientific community. A book on drugs and drug usage published by doctors at Johns-Hopkins University will on its face be more reliable than a book published by "High Times" magazine or The Red-Eye Press. At least, in my opinion.

IV. What to do When You Have Failed to Comply

Someday, if it has not happened already, you are going to realize that a particularly favorable piece of evidence, critical to the defense, has not been given to the Commonwealth, and you are out of compliance with the obligation of reciprocal discovery. Maybe it is a piece of evidence you just got yesterday, though the reciprocal discovery deadline passed a week ago. Let's say it is a letter from the victim to the defendant apologizing for the lies she has told on him. Your client has had this letter for weeks. Thus, you could have and should have given this evidence earlier, but it just did not happen. Now, the Commonwealth is urging the judge to not admit the letter into evidence because it was not handed over. What to do?

Do you really need this letter to go into evidence, or can you get it in another way? Ask the person on the stand if she ever apologized to the defendant for lying. If she denies doing so, ask to use the letter for **impeachment purposes only**. (Although the hearsay rules would allow the letter into evidence as a prior inconsistent statement, this substantive use of the rule may be foreclosed if the letter was never provided in discovery. However, the court would still have discretion to allow it in for impeachment, *i.e.*, non-evidentiary, purposes). If the person who wrote the letter then admits the apology, her testimony will suffice. If she cannot remember writing the apology in the letter, use it **to refresh her recollection.** Then, if after looking at the letter she then remembers apologizing, you do not need to have the letter admitted as an exhibit, nor even have its contents read into the record.

Move for a continuance. Do not just ask for one — place into the record all of the ways you believe your case will be prejudiced by not having the evidence in the record. Do not presume that an appellate court (or appellate counsel, for that matter) will be able to spot or articulate all of the issues and facts which would warrant a continuance.

Also, remember that failing to ask for a continuance may waive your appeal point altogether (See, *e.g.*, *Commonwealth v. Anderson*, Ky., 63 S.W.3d 135, at 141 (2001) where a majority stated with regard to a defense objection to the last second trial amendment of the indictment by the prosecution: "Appellant argues that changing the dates on the indictment 'left the defense unprepared.' If the defendant felt such an amendment was prejudicial, though it is our conclusion that it was not, the defense could have moved to continue the trial in an effort to revamp his defense.") By analogy, if the refusal of a court to admit an exhibit into evidence is prejudicial to the defense's case, an appellate court will expect that counsel would have at least asked for a continuance.

Make an offer of proof: If you cannot use the letter in any fashion and a continuance is denied, make sure you put the letter in by avowal. Don't just tender the letter to the file, also request examination of the person who wrote the letter outside the presence of the jury. Depending upon what the witness says, the Court may reverse its decision on whether you can use the letter for impeachment purposes or to refresh recollection.

Fall on your sword. If all else fails, and its evident that you have made a mistake, make sure the appellate lawyer who will get this case next can make an ineffective assistance of counsel argument. Sometimes, saying honestly on the record that "it's my fault judge, I should have gotten this letter to the Commonwealth sooner, I've not been very effective" will do more to get a reversal of a decision than giving a list of reasons why the failure to comply should be excused. The worst thing that can happen to the client in this case is the failure of the letter to be admitted into evidence at his trial, followed by a finding that the failure to comply with discovery was excusable and understandable

V. Conclusion

Most of the time, defense counsel will not have a lot of documents for which an obligation of reciprocal discovery attaches. But when we do, that obligation cannot be ignored or misconstrued. Maybe the best practice is not even to engage in any analysis whatsoever of what is owed or what is not, and merely give it all over. Regardless. I realize that is not a very scholarly approach to the subject, but it certainly is the safest approach. In the end, there is no trial by ambush, at least as far as documentary evidence is concerned.

Surprise witnesses, of course, are another story…. ■

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The Relevance of Competency to the Decision to Transfer a Child's Case from the Jurisdiction of Juvenile Court to the Jurisdiction of Adult Court

Rebecca DiLoreto

Synopsis

It is widely recognized that both competency and capacity (infancy) are issues that should always be addressed in the representation of children in the juvenile or adult justice system. A child may lack the capacity to have possessed the requisite mental intent to commit an offense. *See Thomas vs. Commonwealth*, Ky., 189 S.W.2d 686 (1945). *See also Spurlock vs. Commonwealth,* Ky., 223 S.W.2d 910, 912 (1949). A child may also be incompetent to stand trial or may have been incompetent to have waived certain rights including the right to have counsel present during an interrogation or the right to have the assistance and advice of counsel before pleading guilty. *See In re Gault*, 387 U.S. 1 (1967); *Fare v. Michael* C. 442 U.S. 707 (1979); *Haley v. Ohio*, 332 U.S. 596 (1948); *Gallegos v. Colorado*, 370 U.S. 49 (1962).

It is equally important to recognize the role competency plays in the judicial decision to transfer a child's case from the jurisdiction of juvenile court to circuit court. Competency requires a context-sensitive, factually based analysis. It is critical to assess both the child's ability to assist his counsel and the child's ability to rationally understand, weigh and select among the options available to her. In the no-holds barred advocacy of circuit court felony litigation, a child must be able to appreciate that the power of the state is geared up to prosecute, find guilty and punish the child. The best interests standard which must motivate a good measure of the actions of the juvenile court and juvenile prosecutor create a very different context in which the child is to assist counsel and make choices. That environment is designed to protect the child while attending to the interests of safety for the larger society and the interests of any identified *victims*. Consequently, greater scrutiny must be given to the competency of those children whose cases are being considered for transfer to adult court. This article leaves us with reason to consider that a child may be competent to be prosecuted in juvenile court yet lack the requisite competency to be prosecuted as an adult.

The origins of requiring that an accused person be competent to be tried: Criminal jurisprudence's concern with the competence of the accused person has its origins in English common law, dating at least back to mid-seventeenth-century England. 4 W. *Blackstone*, Commentaries 24. Eighteenth and Nineteenth Century cases expressed two philosophical bases for the doctrine: (1) conviction and punishment of a mentally ill person would not deter future criminal acts; and (2) it was fundamentally unfair to try a mentally incompetent defendant who might be unable because of mental incapacity to present evidence in defense. *Frith's* Case, 22 Howell's St. Trials 1281 (1800). Our own Sixth Circuit Court of Appeals spoke to the issue in 1899, when a petitioner suffering epilepsy appealed the denial of a continuance sought before trial on the grounds that a recent attack had impaired his mind and memory such that he could not recall the facts of his defense or the charges against him. The Sixth Circuit reversed the judgment against petitioner stating "There was evidence strongly tending to show that the memory and mind of accused shortly before and during the trial were impaired, and rendering it doubtful whether the accused was capable of appreciating his situation, and of intelligently advising his counsel as to his defense, if any he had." *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899).

Definition of Competence and Incompetence. The United States Supreme Court defined incompetence to stand trial in *Dusky v. United States*, 362 U.S. 402 (1960). "The test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the proceedings against him." As can be seen from the language in *Dusky*, from its first analysis of this issue, the Supreme Court made the definition of *competence*, context-sensitive. In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court recognized the role played by the Due Process clause in a competency determination. A hearing on procedural incompetence is mandated whenever the "evidence raises a bona fide doubt as to the defendant's competence to stand trial." *Robinson, supra* 383 U.S. at 385. In *Drope v. Missouri*, 420 U.S. 162 (1974), the Supreme Court reiterated the *Robinson* Due Process standard while noting the difficulty of setting a single standard for competence without reference to the complexity of the case. The Court stated that there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope*, supra 420 U.S. at 180 (1975).

American Bar Association Criminal Justice Mental Health Standard 7-4.1 *Mental incompetence to stand trial; rules and definitions* recognizes that mental incompetence can arise out of a variety of circumstances. The standard states thusly:

> (a) No defendant shall be tried while mentally incompetent to stand trial. (b) The test for determining mental incompetence to stand trial should be

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> whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as a factual understanding of the proceedings. (c) The terms *competence* and *incompetence* as used within Part IV of this chapter refer to mental competence or mental incompetence. A finding of mental incompetence to stand trial may arise from mental illness, physical illness, or disability; mental retardation or other developmental disability; or other etiology so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings.

Kentucky's Statutory Definition of Incompetency To Stand Trial: KRS 504.060*(4)* defines incompetency as the "lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense," as the result of a mental condition. RCr 8.06 states that "if upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences…all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100."

The Purpose of Requiring Competency. It is now commonly recognized that by requiring those accused of offenses to be competent before they may be tried, three goals are preserved. *Understanding Adolescents-A Juvenile Court Training Curriculum, Evaluating Youth Competence in the Justice System*, Robert Schwartz & Lourdes M. Rosado, Editors, ABA, (September 2000). First, the integrity of the criminal process is preserved. The process loses credibility if the accused has no appreciation of the nature and purpose of the proceedings against him. Second, the risk of erroneous conviction or adjudication is reduced. An accused who is competent can inform his counsel of the evidence that may assist him and can help in challenging the state's case. Third, the accused's decision-making autonomy is protected. Our criminal justice system is premised upon respect for the dignity and inherent rights of the individual. Counsel must follow the direction of her client except in specifically defined areas. An incompetent client cannot give that direction. *Id.* at 15. An unrepresented, incompetent person is even more handicapped in her ability to present her position to the court.

The Components of Competency. For juveniles facing transfer, two components or elements of competence to stand trial are critical. *Dusky* requires that the juvenile be able "to consult with counsel with a reasonable degree of rational understanding." *Dusky*, *supra* at 402. Thus, the juvenile must be able to assist his lawyer. Second, the juvenile must be able to make decisions for himself. Thus, the juvenile must understand his options, appreciate their long and short term consequences, weigh the options rationally and express a choice among the alternatives available to him.

Competency to stand trial is a matter of whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether [the defendant] has a rational as well as a factual understanding of the proceedings against him." *United States v. Branham*, 97 F.3d 835, 855 (6th Cir. 1996).

The complexity of competency when applied to accused juveniles who face the possibility of transfer to adult circuit court. As indicated above, according to *Dusky*, *supra*, a proper evaluation of competency requires an examination of the situation, decisions required within and complexity of a client's case. A juvenile facing transfer must be able to weigh even more options than one who will be adjudicated in juvenile court. Some states have mechanisms in place to help accused persons prosecuted in the adult system achieve competency. Courts educate the accused so that she can achieve competency. Such an approach can rarely work with children. As noted by psychologists, Marty Beyer and Joel Greenberg in *Juvenile Competence in Adult Prosecutions: More Than a Matter of IQ and Mental Illness*, p. 1, (2001), "Taking a competency class is unlikely to enhance the decision-making skills of a young person whose immature thinking and emotional problems impede meaningful cooperation with counsel."

Meyer and Greenberg identify four realities that impact the competency of many juveniles who face transfer. *Id.*

1. Immaturity

Juveniles facing transfer are all more immature than any of them will be when they have entered adulthood. They typically possess the following traits:

- Immature thought process
- No long term perspective
- Cognitive inability to weigh alternatives
- Unstable identities
- Total intolerance of unfairness

More needs to be said about the latter two points above. It is typical for youth in the juvenile justice system to have unstable identities. All youth rely upon adults, peers or a popular star to affirm their behavior. It is a natural part of their maturation to identify with and seek ratification from other powerful voices in their lives. It is also natural for a youth to shift from attachment to one role model (parent, teacher, popular star, peer group) to attachment to another role model. The less secure the youth, the more the need for a strong transference of identity. This unstable identity makes it particularly difficult for the child's counsel to assist the child in making a decision, in weighing options. The child may well vacillate from one role model to another or may be unable to make a decision for him or herself without deep involvement by the adult or peer group who ratifies his or her personhood.

Youth also tend to share a trait of seeing unfairness as absolutely intolerable. Though the unfairness of the police, judge or system may be irrelevant to counsel who has uncovered a great way to resolve a case, the child may not be able to remove his focus from the injustices suffered early in the process by, for example, the Court Designated Worker or the arresting officer. This inability to accept that life is unfair or that someone in a position of authority acted unfairly, can impede a child's ability to participate competently in his defense at trial or adjudication by causing the child to be unable to remove his focus from the unfairness towards identification of realistic options.

2. Disabilities

Many of our clients in juvenile court suffer disabilities that are age related, genetic or a result of birth defects. These include difficulties in the following skills:

- Reading
- Writing
- Listening
- Thinking
- Spelling
- Doing calculations
- Organizing thoughts
- Controlling emotions

Clients who are not literate often see the world differently than literate persons. They relate stories differently. They understand time sequences differently. Juvenile clients who cannot listen, spell, or handle basic calculations are at a significant disadvantage in assisting counsel with the defense or in understanding the charges against them or the consequences of a finding of guilt. Juveniles who suffer from prenatal substance abuse exposure have special difficulties organizing their thoughts and controlling their emotions. *Meyer & Greenberg*, *supra* at 2.

3. Trauma

One needs to sit through only one docket of juvenile court or view the hallways of the district court house, or read the local section of the daily newspaper to recognize that the children who populate the status and public offender docket and who ultimately face transfer to adult court have often been subjected to untold and unimagined trauma. Clients served by DPA lawyers suffer the trauma attendant to economic disadvantage. Many live within families whose interactions are patterned with violence, abandonment or neglect. These circumstances cause trauma in a child's life that can have significant impact on competency.

- Can freeze the child's mental and emotional development
- Can cause depression
- Can cause other significant mental illnesses
- Can lead to sleep deprivation

It is obvious to all of us that the presence of a psychosis would undermine competency. What may not be so obvious is that depression, in itself, can compromise the individual's ability to apply intelligent reasoning to a situation. Depression can cause feelings of worthlessness or guilt (apart from whether or not one is legally guilty); difficulty thinking, concentrating or making decisions; or recurrent thoughts of death or suicidal ideation. *See Diagnostic and Statistical Manual (DSM-IV-TR) of Mental Disorders*, Fourth Edition, American Psychiatric Association (2000). Juveniles begin the process at a disadvantage, handicapped simply by their immaturity, in their effort to understand the legal dilemmas that they face and the choices they must make as their cases wind through the system. Add to that inherent handicap, the impact of pretrial detention alone and you have at a minimum with every detained child, an immature, not fully developed mind, body and emotional state combined with the situational depression attendant to pretrial incarceration.

It is quite easy to place ourselves in the mind of the incarcerated seventeen year old awaiting transfer or adjudication. The youth is at a minimum frustrated about being incarcerated. Angry with himself about disappointing the significant adults in his life. Confused about his legal situation. Fearful about the future. He has been advised by his lawyer to speak with no one about his case, his fears or his options. His lawyer cautions him to look at those incarcerated with him and those holding his person with a level of mistrust or suspicion as to their motives. Having operated up to this point in a world where his interests are at least allegedly always taken into consideration by those representing the government or the school officials, as he faces transfer, he is warned that no one but his lawyer has his interests at heart.

The United States Supreme Court has demanded in other contexts that our legal system give special consideration to the inability of adolescents to make mature decisions. In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Supreme Court recognized in the context of parental notification statutes that the law must treat children differently than it does adults by recognizing their special vulnerability and inability to make adult decisions. The statute at issue in *Bellotti* required the notification of parents of all children under the age of eighteen who sought abortion, thereby acknowledging that even older adolescents require special protection by virtue of their immaturity and inadequate abilities to make serious and informed decisions. The *Bellotti* Court directly cited three reasons for requiring greater protection of the rights of children than those of adults. The Supreme Court stated that "the constitutional rights of children cannot be equated with those of adults" because of "the peculiar vulnerability of children, their inability to make critical decisions in an informed mature manner, and the importance of the parental role in child rearing." *Bellotti supra* at 634. The Supreme Court warned against the uncritical, simplistic application of legal theories without consideration of the special circumstances that sur-

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round juveniles. When Kentucky's transfer statute is applied mechanistically to declare it appropriate to transfer the cases of adolescents to adult court without a full consideration of the competency of that child, the law operates in violation of the constitution.

Considerations Surrounding the Transfer of Juveniles to Circuit Court Require That Counsel Evaluate and Raise Concerns About Competency at the Time of Transfer in Juvenile Court and At the time of Arraignment in Adult Court. The American Bar Association has noted that "[a] determination of competence or incompetence is functional in nature, context-dependent and pragmatic in orientation, and should be viewed as such by both courts and mental health and mental retardation professionals." *ABA Criminal Justice Mental Health Standards*, Commentary to Standard 7-4.1 p. 175 (1984). The standards go on to note that "an evaluator should consider a defendant's mental ability in relation to the severity of the charge and the complexity of the case." *Id.* For an adolescent, facing the prospect of entering the adult world prematurely as an accused person, there is nothing more complex than the maze of the criminal justice system which lies before him.

The map to Middle Earth from *Lord of the Rings* is no more convoluted than the journey of a youthful offender from the protections of juvenile court to the no-holds barred prosecution and potential of incarceration as an adult. A complete assessment of competency must be undertaken in juvenile court, prior to transfer, to assure that the child possesses the ability to rationally consult with his lawyer-and to have a rational as well as a factual understanding of the proceedings against him. Should the issues raised in juvenile court be resolved to the detriment of the juvenile client, it is incumbent upon trial counsel to raise competency concerns again at the time of arraignment and trial so that the issue may be fully considered by the circuit court and adequately preserved, if necessary, for later appeal. ■

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Jim Dougherty, Cook County Public Defender

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PRACTICE CORNER

LITIGATION TIPS & COMMENTS COLLECTED BY MISTY DUGGER

Misty Dugger

Only Trial Court May Excuse Subpoenaed Witnesses

In *Anderson v. Commonwealth*, Ky., 63 S.W.3d 135, at 141 (2001), the Kentucky Supreme Court held that once a witness is subpoenaed, that witness is answerable to the court and can only be excused by the Court. The basis for this ruling was the Court's interpretation of RCr. 7.02, *Otis v. Meade*, Ky., 483 S.W.2d 161 (1972) and CR 45.01 and 45.06. In *Anderson*, the Commonwealth instructed a witness that he did not have to appear. This witness was material to the defense and the defendant was expecting that witness to be in court. While the Supreme Court did not reverse on the issue because "the release of a witness is not newly discovered evidence" it did feel the need to comment and condemn the practice of the Commonwealth in this case. If this occurs in one of your cases, dismissal should be requested, and if that is denied, a continuance pending the arrival of the subpoenaed witness.

~ John Palombi, Appeals Branch

Misdemeanor Sex Offense Equals Aggravated Felony Under Federal Sentencing Guidelines In Deportation Cases

In *U.S. v. Gonzales-Vela*, ___ F.3d ___, 2001 WL 1504553 (6th Cir.(Ky.)), the Sixth Circuit announced, "[A]s long as a defendant's former conviction leading to deportation can legitimately be termed 'sexual abuse of a minor,' that act must be considered an 'aggravated felony' *for immigration law purpose*, regardless of a state designation as either a felony or a misdemeanor." In 1997, Gonzales-Vela pled guilty to misdemeanor second-degree sexual abuse in a Kentucky circuit court and was sentenced to 60 days, time-served. Later in federal court, Gonzales-Vela pled guilty to illegally re-entering the United States and was sentenced to 21 months imprisonment. On appeal, the government argued that the district court should have added 16 levels to Gonzales-Vela's base offense level because his prior conviction of second-degree sexual abuse should be treated as an "aggravated felony" under the federal sentencing guidelines. The 6th Circuit agreed and remanded for re-sentencing at the higher base offense level. Under the federal sentencing guidelines, an "aggravated felony" includes "murder, rape, or sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A). The 6th Circuit rejected the argument that a state misdemeanor conviction cannot be turned into an "aggravated felony" for purposes of § 1101(a)(43): "There is no explicit provision in the statute directing that the term 'aggravated felony' is limited only to felony crimes. . . We therefore are constrained to conclude that Congress, since it did not specifically articulate that aggravated felonies cannot be misdemeanors, intended to have the term aggravated felony apply to the broad range of crimes listed in the statute, even if these include misdemeanors." (*quoting Guerrero-Perez v. INS*, 242 F.3d 727, 736-737 (7th Cir. 2001)). The Court notes this holding is limited to immigration law. Nevertheless, the *Gonzales-Vela* ruling should be considered by attorneys when discussing with clients the advisability of a plea involving sexual abuse charges.

~ Rebecca DiLoreto, Post Trial Div. Director
& Emily Holt, Appeals Branch, Frankfort

If The Commonwealth Puts On Testimony By Avowal, Cross-Examine The Witness

Without cross-examination of the Commonwealth's avowal witness, the testimony elicited by the Commonwealth becomes the only record for review on appeal. If the Commonwealth cross-appeals the denial of the evidence, it can be extremely difficult for the defense to argue why the evidence was properly excluded when there is no record showing any cross-examination of the testimony. To preserve a record, demonstrate why the evidence offered by the Commonwealth was properly denied. Thus, treat testimony on avowal as if it is evidence presented before the jury by cross examining the witness and objecting for the record.

~ Karen Maurer, Appeals Branch, Frankfort

Check Out The New AOC Website

The new AOC website now offers expanded services including local court rules, publications, electronic forms, and other resources. The forms are in editable PDF format and can be downloaded, filled out and printed. The website is: http://www.kycourts.net/

~Will Hilyerd, DPA Law Librarian, Frankfort

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us. ■

Public Advocacy Seeks Nominations

DPA seeks nominations for the Department of Public Advocacy Awards which will be presented at this year's 30th Annual Conference in June. An Awards Committee recommends recipients to the Public Advocate for each of the following awards. The Public Advocate then makes the selection. Contact Lisa Blevins at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 294; Fax: (502) 564-7890; or Email: lblevins@mail.pa.state.ky.us for a nomination form. **All nominations are to be submitted on this form by April 3, 2002.**

Gideon Award: Trumpeting Counsel for Kentucky's Poor

In celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Gideon* Award was established in 1993. It is presented at the Annual Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. Clarence Earl Gideon was denied counsel and was convicted. After his hand-written petition to the U.S. Supreme Court, he was acquitted upon retrial where he was represented by counsel.

1993 **J. Vincent Aprile, II**, DPA acting General Counsel
1994 **Dan Goyette**, Director of the Jefferson County District Public Defender's Office and the Jefferson District Public Defender's Office
1995 **Larry H. Marshall**, Assistant Public Advocate in DPA's Appellate Branch
1996 **Jim Cox**, Directing Attorney, DPA's Somerset Office
1997 **Allison Connelly**, Assistant Clinical Professor, UK, former Public Advocate
1998 **Edward C. Monahan**, Deputy Public Advocate
1999 **George Sornberger**, DPA Trial Division Director
2000 **John P. Niland**, former DPA Central Regional Manager
2001 **Ann Bailey-Smith**, Chief Trial Attorney, Louisville-Jefferson County Public Defender Corporation

ROSA PARKS AWARD: FOR ADVOCACY FOR THE POOR

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Public Defender Conference to the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream."

1995 **Cris Brown**, Paralegal, DPA's Capital Trial Branch
1996 **Tina Meadows**, Executive Secretary to Deputy, DPA's Education & Development
1997 **Bill Curtis**, Research Analyst, DPA's Law Operations Division
1998 **Patrick D. Delahanty,** Chair, Kentucky Coalition Against the Death Penalty
1999 **Dave Stewart**, Department of Public Advocacy Chief Investigator, Frankfort, KY
2000 **Jerry L.Smothers, Jr.,** Investigator, Jefferson County Public Defender Office, Louisville, KY
2001 **Cindy Long**, Investigator, Hopkinsville

NELSON MANDELA LIFETIME ACHIEVEMENT AWARD

Established in 1997 to honor an attorney for a lifetime of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

1997 **Robert W. Carran**, Attorney, Covington, KY, former Kenton County Public Defender Administrator
1998 **Col. Paul G. Tobin**, former Executive Director of Jefferson District Public Defender's Office
1999 **Robert Ewald**, Chair, Public Advocacy Commission
2000 **John M. Rosenberg**, A.R.D.F. Director, Public Advocacy Commission Member
2001 **Bill Johnson**, Frankfort Attorney, Johnson, Judy, True & Guarnieri, Public Advocacy Commission Member

IN RE GAULT AWARD: FOR JUVENILE ADVOCACY

This Award honors the person who has advanced the quality of representation for juvenile defenders in Kentucky. It was established in 2000 by Public Advocate, Ernie Lewis and carries the name of the 1967 U.S. Supreme Court case that held a juvenile has the right to notice of changes, counsel, confrontation and cross-examination of witnesses and to the privilege against self-incrimination.

1998 **Kim Brooks**, Director, N. Ky. *Children's Law Center, Inc.*
1999 **Pete Schuler**, Chief Juvenile Defender, Jefferson District Public Defender Office
2000 **Rebecca B. DiLoreto**, Post-Trial Division Director
2001 **Gail Robinson**, Juvenile Post-Disposition Branch Manager

PROFESSIONALISM & EXCELLENCE AWARD

The *Professionalism & Excellence Award* began in 1999.

The President-Elect of the KBA selects the recipient from nominations. The criteria is the person who best emulates Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: *prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to insure; high quality representation of clients, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.*

1999 **Leo Smith**, Deputy, Jefferson Co. Public Defender Office
2000 **Tom Glover,** DPA Western Regional Manager
2001 **Don Meier,** Assistant Public Advocate, Jefferson Co. Public Defender Office

ANTHONY LEWIS MEDIA AWARD:

Established in 1999, this Award recognizes in the name of the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964), the media's informing or editorializing on the crucial role public defenders play in providing counsel to insure there is fair process which provides reliable results that the public can have confidence in. **Anthony Lewis**, himself, selected two recipients to receive the Award named in his honor in its first year.

1999 **Jack Brammer**, *Lexington Herald Leader*, March 5, 1999 article, "The Case of Skimpy Salaries: Lawyers for poor make little in Ky." **and David Hawpe**, Editorial Director, and ***The Courier Journal*** for their history of coverage of counsel for indigent accused and convicted issues from funding to the death penalty.
2000 **Robert Ashley**, Editor, *The Owensboro Messenger*
2001 **Joel Pett**, Editorial Cartoonist, *Lexington Herald-Leader*

FURMAN CAPITAL AWARD

Established in 2000 by Public Advocate Ernie Lewis, it honors the person who has exhibited outstanding achievements on behalf of capital clients either through litigation or other advocacy. William Henry Furman's name appears in the landmark decision, *Furman v. Georgia*, 408 US 346 (1972) which abolished capital punishment in the nation for four years. Furman was a 26 year old African-American who had mental limitations and who finished the 6th grade. Today, Furman lives and works in Macon, Ga.

2000 **Stephen B. Bright**, Director for the Southern Center for Human Rights, Atlanta, Georgia
2001 **Mark Olive**, Attorney, Tallahassee, Florida, Habeas Assistance and Training Counselor ■

Executing Juveniles is Unacceptable

Robert E. Hirshon
President, American Bar Association

Executing adolescents is unacceptable in a civilized society, irrespective of guilt or innocence.

While some have argued that when juveniles commit an "adult crime" they deserve this ultimate adult punishment, the purposes ostensibly served by executing adults are not served by executing juveniles. In light of the characteristics associated with childhood — impulsiveness, lack of self-control, poor judgment — we cannot reasonably expect the death penalty to act as a deterrent for other juveniles. Retribution is also an unsatisfactory justification for the juvenile death penalty. The moral force of — and legal justification for — taking a human life in retribution is dependent on the degree of culpability of the offender. A juvenile simply cannot be held to the same degree of culpability and accountability for his or her actions to which we hold an adult.

Recent scientific research has shown that adolescent's brains are still developing late into their teens and that teens are much more immature than we ever knew. Prominent researchers have determined that the areas of the brain that are still developing are those in the frontal cortex –the areas that control "executive" functions such as impulse-control, judgment, emotional regulation, organization and planning. As the president of the Kentucky Psychiatric Association recently wrote, "Scientific proof that even normal adolescents are in far less control of their thoughts, impulses and actions shows us that they should not be held to the same standards of punishment as fully developed adults." The death penalty for teens under 18 is no longer an issue of morality alone. It is also one of science.

For all these reasons, the American Bar Association is encouraged to learn that the Kentucky legislature is currently considering a bill to eliminate the death penalty for juvenile offenders. We urge citizens of Kentucky, and particularly lawyers, to work toward enacting such reform.

Similar efforts are underway in states across the country – in Arizona, Florida, Indiana, and Missouri. They are backed by a number of recent polls indicating that support nationwide for the juvenile death penalty is low. A 2001 national poll by the *Houston Chronicle* found that among people who otherwise believe in capital punishment, fewer than 30 percent would support executing someone who was a juvenile at the time of offense. A recent poll by the National Opinion Research Center found only 34 percent support. And in Kentucky, the University of Kentucky Survey Research Center showed that 8 out of 10 do not favor executing juvenile offenders.

This vast majority of Americans is also in step with the international consensus that juvenile offenders should not face execution. The execution of juvenile offenders has all but ended around the world. In the last three years the number of nations that execute juvenile offenders has dropped to only three: Iran, the Democratic Republic of Congo and the United States. Several international treaties, including the International Covenant on Civil and Political Rights, the U.N. Convention on the Rights of the Child, and the American Convention on Human Rights, directly prohibit executing juvenile offenders.

The American Bar Association exists to defend liberty and pursue justice. One of its primary goals is to provide ongoing leadership in improving the law to serve the changing needs of society, such as eliminating the juvenile death penalty. We urge all members of the bar to support such efforts. Lawyers take a sacred oath to ensure the fundamental exercise of justice. Ending the juvenile death penalty is just such a matter of fundamental justice. ■

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